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UNIT TRUSTS

THE recent proliferation of unit trusts recalls attention to Maitland's dictum that of all the exploits of equity, "the largest and most important is the invention and development of the Trust." He added, "It is an 'institute' of great elasticity and generality; as elastic, as general, as contract." [1] Not least among the diversity of purposes for which the trust concept has been employed is the purpose of business investment.

Basically a unit trust is an arrangement whereby property is held on trust for a large number of investors. It is constituted by a deed [2] regulating the rights, powers and duties of the parties to the arrangement. These parties are usually a manager, a trustee and investors, the last being commonly known as unit holders. The manager purchases property and vests the title to it in the trustee who, at the outset, holds on trust for the manager. Sometimes the property is an estate in land or a mortgage thereof but most unit trusts are in respect of a portfolio of shares. In the ensuing discussion the former will be called a land-unit trust and the latter a share-unit trust. The beneficial interest is divided into a large number of units which are sold by the manager to investors. Share-unit trusts are of two kinds: fixed and flexible. In the fixed unit trust the portfolio of shares is fixed and not, except in special circumstances, subject to variation. The first portfolio of investments in a fixed unit trust is described as a unit and the beneficial interest is divided into sub-units which the manager sells to investors. A fixed unit trust deed will usually provide for the constitution of additional units matching the first portfolio which will be vested in the trustee and divided into the same number of sub-units. In the flexible unit trust the manager and the trustee have power under the deed to vary the nature and proportions of the shares comprising the trust fund. Unlike the fixed trust the portfolio in a flexible trust cannot be divided into rigidly constituted units but the

[1] *Lectures on Equity*, 23 (1936).
[2] For a precedent of a fixed or flexible unit trust deed see (1956) 20 *Conveyancer* (N.S.) 765.

beneficial interest in the trust fund whatever its constitution from time to time is divided into parts described as units. In both land-unit trusts and share-unit trusts the sale of units (or sub-units) is at a price fixed on the market value plus a service charge to cover the expenses of the manager, a profit for the manager and the remuneration of the trustee.

The manager agrees to buy back units from any unit holder desiring to sell. These units may be resold by the manager. The trust deed will usually provide that the trust is to come to an end at a fixed date and one of several modes of dissolution will operate: the property may be realised and the proceeds distributed amongst the unit holders, the trust may be converted into an investment company or, if the property admits of division *in specie*, it may be so divided between unit holders.

The idea of vesting property in a trustee for a large number of investors is not new. The unincorporated trading company, common in England at the end of the eighteenth century, was organised in such a way that the property of the company was held by trustees for the benefit of the investors on the terms of a deed of settlement which prescribed the rights, duties and powers of the members of the trading company.[3] When the legislation regulating trading companies was enacted in the middle of the nineteenth century the provisions of the deed of settlement in the earlier unincorporated trading companies became the model for the articles of association of the new registered companies. The development of unincorporated business enterprises in the form of unit trusts provides an interesting example of a throwback in the evolution of legal institutions.

In America the adaptation of the trust to the purpose of organising business enterprises has been carried out to a much greater extent. Because American law governing corporations had a different development from that of England or Australia in the nineteenth century, many large and well-known businesses have been organised as unincorporated trusts.[4] This practice began in Massachusetts because of the difficulty of obtaining a corporate charter for the acquisition and development of real estate without a special Act of the legislature.[5] Because of this, these business trusts are sometimes referred to as "Massachusetts Trusts."

A Unit Trust Distinguished From Agency

There can be no trust unless one person has the title to specific property for the benefit of another person or some charitable

[3] Cooke, *Corporation, Trust and Company*; Gower, *Modern Company Law*, 2nd ed., 31–34.

[4] *e.g.*, North American Pulp and Paper Company; Adams Express Company; American Express Company; American Trust Company. See 156 *American Law Reports* 29, note 17.

[5] Wrightington, 21 Yale L.J. 311, 312; *State Street Trust Company* v. *Hall* (1942) 311 Mass. 299; 41 N.E. (2d) 30: 156 *American Law Reports* 13.

purpose; the essential characteristic is an obligation with respect to specific property. An agent may be given the possession of property or he may have the title to property, but it is not a necessary feature of agency that an agent should be entrusted with property.

Another distinction between a trustee and an agent lies in the contrast between the degree of control to which each is subject at the hands of the other party to the relation. A beneficiary who is *sui juris* and absolutely entitled to the beneficial interest may direct the trustee to convey the trust property to him, but the trustee is not under the control of the beneficiary unless the trust instrument expressly subjects him to that control; the mere existence of a trustee-beneficiary relationship does not involve that control.[6] On general equitable theory all the unit holders could come together and ask the trustee to terminate a unit trust by conveying the trust property to them. This assumes that they are all of full age and capacity. The possibility of their doing this, however, does not make the relationship between the trustee and the unit holders that of agent and principal. Nor does it make the relationship between the manager and the unit holders that of principal and agent. On the other hand an agent in the strict sense is a delegate of his principal; all his powers emanate from his principal and they are subject to withdrawal and variation by the principal.

The agent-principal relation and the trustee-beneficiary relation may overlap.[7] If the trust instrument confers on the beneficiary a power to give detailed directions to the trustee the consequence may be that the trustee is also an agent for the beneficiary. If this happens the trustee-agent can make the beneficiary-principal personally liable to third persons. Accordingly, in drawing unit trust deeds care must be taken to avoid creating a principal-agent relationship between either the unit holders and the trustee or between the unit holders and the manager.

A Unit Trust Distinguished From a Registered Company

The basic distinction between the registered company and the unit trust is the law's deliberate treatment of the registered company as a distinct legal entity and its failure to take the same anthropomorphic view of a trust. One result of this is the view that a company owns its property in its own right in such a way that its shareholders are not conceived of as having any interest in the company's property. An Australian case illustrates this. Dixon C.J., Kitto and Taylor JJ. of the High Court of Australia in *Charles* v. *Federal Commissioner of Taxation*[8] were concerned with the

[6] *Re Brockbank* [1948] Ch. 206.
[7] *Smith* v. *Anderson* (1880) 15 Ch.D. 247 at p. 280, *per* Brett L.J.
[8] (1954) 90 C.L.R. 598.

question whether profits made by the trustee of a unit trust, partly from realisations of holdings and partly from the proceeds of sale of "rights" in respect of new share issues, were, on distribution to unit holders, taxable as income. In a joint judgment they said [9]:

> "[A] unit held under this trust deed is fundamentally different from a share in a company. A share confers upon the holder no legal or equitable interest in the assets of the company; it is a separate piece of property; and if a portion of the company's assets is distributed among the shareholders the question whether it comes to them as income or as capital depends upon whether the corpus of their property (their shares) remains intact despite the distribution: *Inland Revenue Commissioners* v. *Reid's Trustees*.[10] But a unit under the trust deed before us confers a proprietary interest in all the property which for the time being is subject to the trust of the deed: *Baker* v. *Archer-Shee* [11]; so that the question whether moneys distributed to unit holders under the trust form part of their income or of their capital must be answered by considering the character of those moneys in the hands of the trustees before the distribution is made."

The court held that, on the basis of the evidence given in the tribunal below, the profits did not arise from the sale of property acquired for the purpose of profit-making by sale and therefore were not to be included in the unit holder's assessable income. In this case the trust deed gave no power to traffic in securities; it gave a wide power to vary investments but for the purpose of security of capital and there was evidence that securities were never acquired for the express purpose of resale at a profit.[12]

[9] At p. 609.
[10] [1949] A.C. at p. 373.
[11] [1927] A.C. 844.
[12] Recently in Victoria an arrangement called a mutual fund has been established by incorporating an unlimited company whose shares will be held by investors. The unlimited company will obtain a portfolio of investments and will operate in a manner similar to the normal investment company. The virtue of incorporation as an unlimited company lies in the ability to reduce capital without a court's approval. This enables unwinding of the fund if there should be heavy waves of reselling by investors. For the protection of investors the articles of association limit the total amount of liabilities which the unlimited company may incur. The mutual fund is managed by a separate service company. The advantage to the investor of this arrangement over a unit trust is in regard to taxation. Under Australian income tax law a unit holder with a vested interest in income earned by a unit trust would be liable to pay tax on income in the year it was received by the trustee even though it was not distributed. By contrast the shareholder in a non-private company is liable to pay tax only on dividends paid to him. A company resident in Australia and receiving dividends is entitled to a rebate of tax on those dividends in such a way that it pays little, if any, tax in respect of them. The service company undertakes to purchase the shares of an investor at a price based on the current value of the mutual fund's assets. The shareholder who sells to the service company thus receives the benefit of any undistributed income as a tax-free capital gain. The mutual fund arrangement is a hybrid. Because shares in the mutual fund are constantly available, because the repurchase price is likely to be closely related to the value of the underlying investments and because it is necessary to restrict the mutual fund borrowing powers this

The distinction between a unit trust and a registered company also has a bearing on apportionment as between successive interests.[13]

A Unit Trust Distinguished From an Unincorporated Association Prohibited by the Companies Act [14]

The leading authority is *Smith* v. *Anderson* [15] in which the Court of Appeal held valid the Submarine Cables' Trust which had been set up in 1871. Shares in submarine telegraph companies of the aggregate nominal amount of £400,000 were purchased by subscription and vested in trustees. For every £90 subscribed a subscriber received a certificate for the nominal amount of £100, and a deferred coupon for one 4200th part of the fund, the number of certificates being 4200. Under the trusts of a deed made between the trustee and a covenantee on behalf of the certificate holders, the trustees were to apply the income of the fund in payment of interest to certificate holders at a fixed rate on the nominal amounts of the certificates and to apply the surplus in redeeming certificates. The trustees had a discretion to sell any shares if they could be sold at a premium of not less than 30 per cent. over cost price, but, except in that case, no shares should be sold unless the trustees unanimously resolved that a sale was in the interest of certificate holders. The proceeds of a sale were to be applied in the redemption of certificates, unless the trustees by a unanimous resolution, confirmed by a meeting of certificate holders, determined to reinvest in submarine telegraph shares. When all certificates had been redeemed the funds in hand were to be divided among the holders of deferred coupons. Annual meetings of certificate holders were to be called by the trustees to receive reports from the trustees on the affairs of the trust, to appoint auditors, and to appoint new

arrangement seems closer to the unit trust than the traditional investment company. But the taxation results to the investor, the possibility of accumulating income and the use of incorporation suggest an affinity with investment companies.

13 *Re Whitehead's Will Trusts* [1959] 3 W.L.R. 33. Trustees of a will had power to retain certain sub-units in a fixed share-unit trust. Part of the amount distributed arose from the sale of bonus shares. The trustees were directed by the court that in apportioning the amount distributed between income beneficiary and remainderman they were to act as if they were the direct shareholders of the shares held by the trust. Contrast the apportionment of dividends received from an investment company. If the unit trust is so flexible as to permit trafficking in shares the amounts periodically distributed by the trustee would probably be treated as income.

14 Companies Act, 1948 (Eng.), ss. 429, 434.
Companies Act, 1936–1957 (N.S.W.), s. 8.
Companies Act, 1958 (Vic.), s. 12 (4).
Companies Act, 1931 (Q'ld.), s. 12.
Companies Act, 1934–1952 (S. Aust.), s. 9.
Companies Act, 1943–1954 (W. Aust.), s. 11.
Companies Act, 1920 (Tas.), s. 10.
Companies Act, 1955 (N.Z.), s. 456.

15 (1880) 15 Ch.D. 247.

trustees in the place of trustees who should die, retire or become incapable of acting. The plaintiff, a certificate holder, claimed that the certificate holders were an unregistered association of more than twenty persons formed after the passing of the Companies Act, 1862, for the purpose of carrying on business that had for its object the acquisition of gain by the association or the individual members thereof, that the association was therefore illegal and that the trust should be wound up. At first instance Jessel M.R. decided for the plaintiff but the Court of Appeal reversed his decision. First, the certificate holders were not an "association" because they were not linked by contractual relations *inter se*.[16] Secondly, assuming that the certificate holders were an association and even assuming that the management of the trust amounted to the carrying on of a business, that business was carried on by the trustees and not by the certificate holders.[17] The trustees were not agents of the certificate holders. Thirdly, the management of the trust did not amount to the carrying on of any business. In the view of Brett L.J. the trustees "were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not for the purpose of obtaining gain from a repetition of investments."[18] Cotton L.J. said[19]: "If it appeared that the real object of the deed was that the trustees should speculate in investments, even though confined to this particular class, the case would have stood in a very different position."

If a unit trust were organised so that the trustee was subject to such a degree of control by the beneficiaries that he could be said to occupy the dual positions of agent and trustee, it might not be possible to deny that the unit holders constituted an association on the ground that there was no contractual relation between the unit holders *inter se*. If one investor agreed with the manager that he should become a unit holder on terms that the manager was to be his agent, that the manager was to be the agent of other unit holders, that the manager was to administer a common fund for the benefit of all unit holders for the time being and that at the end of a term of years the manager as agent for all unit holders was to divide the common fund between unit holders for the time being it would be arguable that there was a contract between unit holders *inter se*.[20] The manager in making contracts with each investor would be acting as agent for all the previous investors and would bring all investors into contractual relations with each other.[21]

[16] (1880) 15 Ch.D. 247 at p. 274, *per* James L.J.

[17] (1880) 15 Ch.D. at p. 275, *per* James L.J.; at p. 280, *per* Brett L.J.; at p. 284, *per* Cotton L.J.

[18] *Ibid.* at p. 279.

[19] *Ibid.* at p. 283.

[20] *Cf. Re Tasmanian Forests and Milling Co. Proprietary, Ltd.* (1932) 27 Tas.L.R. 15.

[21] *Clarke* v. *Earl of Dunraven* [1897] A.C. 59 affirming the decision of the Court of Appeal, reported *sub nom. The Satanita* [1895] P. 248. It is noteworthy that in the fourth edition of Cheshire and Fifoot, *The Law of*

Given that the manager was an agent and given that the manager was required to traffic in investments in such a way that it could be said that a business was being carried on,[22] the carrying on of that business could be imputed to the principals—the unit holders—and if they numbered more than twenty the trust would constitute an unregistered association of the kind proscribed by the Companies Act.

It appears from *Smith* v. *Anderson* that agency will not arise merely because the deed purports to give to unit holders powers no greater than they would possess in their character as adult beneficiaries of full capacity.[23]

A Unit Trust Distinguished From a Life Assurance Contract

A unit holder and a person who enjoys the benefit of life assurance are similar in that they both depend on the investing skill of professional investors. There is, however, a clear legal distinction between a unit trust and straight life assurance or fixed annuity contracts. In those forms of assurance the insurer is obliged contractually to pay a fixed sum or a series of fixed sums to the beneficiary of the policy. The obligation of the insurer is not linked to any specific property. Even if the insurer were to lose all his assets without negligence he would remain liable to make the stipulated payments. In a unit trust, on the other hand, the extent of a unit holder's benefits depends on the fluctuations in value of specific trust property. The trustee's obligations are linked to the specific trust property. If a trustee manages the trust property in the same manner that a man of ordinary prudence would look after his own property, but, nevertheless, the trust property is lost, the trustee is not personally liable to the unit holder.[24]

Contract, the learned authors inserted, at p. 31, a passage in which they suggest that the best explanation of the decision in *Clarke* v. *Earl of Dunraven* is that the Yacht Club acted as agent for all the competitors in turn so as to bring them into mutual relations with each other. See also Anson, *Principles of the English Law of Contract*, 21st ed., 39.

22 In Victoria, given that the manager was an agent, it would not be necessary to show that a business was being carried on. The Companies Act, 1958 (Vic.), s. 12 (4), unlike earlier Victorian legislation, and the present Companies Act, 1948 (Eng.), ss. 429, 434, contains no reference to the purpose of "carrying on any business."

23 In America courts have had to determine whether particular Massachusetts trusts have been trusts or partnerships in connection with the liability of members to creditors dealing with the trustees and liability to taxation as a partnership. A number of jurisdictions use the "control test." If the trust instrument gives to the trustees the exclusive right to manage the business free from the control of the members the organisation is a trust. On the other hand, if the trustees are, by the terms of the trust instrument, subject to the control of the members in the conduct of the business the organisation is a partnership: *Williams* v. *Milton* (1913) 215 Mass. 1; 102 N.E. 355.

24 *Jobson* v. *Palmer* [1893] 1 Ch. 71.

Life assurance companies and promoters of unit trusts are in competition to attract the savings of unskilled investors. In America, due no doubt to the competition between traditional life insurers and the promoters of the American equivalent of a unit trust, the variable annuity has emerged. The variable annuity introduces two new features. First, the premiums collected are invested to a much greater degree in ordinary shares and other equity investments. Secondly, benefit payments vary according to the success of the insurer's investment policy. This is brought about by tying the value of the annuitant's benefits to a proportion of the insurer's investments but without actually appropriating any investments to the particular contract. In some respects the variable annuity resembles the traditional fixed annuity: payments are made periodically by the insurer; they are made until the annuitant's death; they are made both from principal and income; and the amounts vary according to the age and sex of the annuitant. The same actuarial principles are used to calculate the fixed annuity and the variable annuity. The insurer assumes the risk of mortality from the moment the contract is issued on the basis of an actuarial prediction that a certain number of annuitants will survive to specified ages. Even if it should turn out that a substantial number live beyond their predicted deaths, the insurer is obliged, whether the annuity be fixed or variable, to make the annuity payments on the basis of the mortality prediction reflected in the contract. A variable life annuity contract is comparable with provisions in percentage leases [25] and with provisions by which contractual obligations are geared to the price of particular commodities or to a cost-of-living index. In the variable life annuity the measure is to some extent under the control of the obligor and it is this feature which makes the arrangement appear to be a form of trust. A variable life annuity contract differs from a unit trust, however, because there is no appropriation of any part of the insurer's investments to the obligation owed to any particular annuitant. Under a trust if the trust property is irretrievably lost or destroyed without fault on the part of the trustee—*e.g.*, if it can no longer be traced or if there is capital depreciation for which the trustee is not responsible—the beneficiary will be left with no rights against the trustee. In the variable life annuity contract it is contemplated that the investor may suffer loss as the result of some diminution of the insurer's investments, but in legal theory that loss would be explicable as a decrease in the extent of the obligor's personal obligation according to an agreed measure. Moreover, that measure is concerned only with certain types of loss; it is intended to reflect only investment market loss. If the insurer suffered loss of its investments through the activities of a forger

[25] (1948) 61 Harv.L.R. 317; Landis (1955) 11 Univ. of Toronto L.J. 43; MacDougall, "Conveyancing and Inflation," (1958) 31 Aust.L.J. 873.

it would, in the absence of specific provision, still be personally liable to the annuitant even though a trustee suffering that loss might not be personally liable. Presumably, if that type of loss occurred the measure would still have to be maintained and the insurer would have to replace the investment. All this suggests that the annuitant does not have an interest in any specific investments and that the arrangements cannot therefore be placed in the legal category of a trust. If it were stipulated in a variable life annuity contract that loss of the underlying investments from any cause would cause loss to the annuitant the arrangement could be a trust.

Regulation of Unit Trusts

The promotion of a unit trust affects the public interest, the interests of companies in which the trust may hold shares and the interests of potential unit holders. While inordinate legal regulation of business activity is to be deplored it would be surprising if unit trusts did not call for some regulation.

The Public Interest

The interest of the public in the activities of unit trusts raises mainly economic questions such as whether there is any significant diversion of funds from government loans and whether there is any public advantage in the encouragement of equity investment by persons of small means.

The organisation of a unit trust does, however, raise a legal question whether the traditional public interest in freedom of circulation of property is offended.

Like any other trust a unit trust must comply with the doctrines requiring that there should be no direct or indirect restraint on alienation of property beyond a reasonable period. The policy favouring freedom of alienation of property is effectuated in various rules. First, there is the rule against remoteness of vesting.[26] In an ordinary unit trust the whole beneficial interest is at the outset vested in the manager. When certificates are issued to unit holders the beneficial interest is transferred in part to other beneficiaries. Those other beneficiaries acquire vested interests. The rule against remoteness of vesting is not infringed; at no time is there any person with an interest which is merely contingent. It is true that the trust deed contemplates that unit holders will acquire interests some time in the future. Even if it is contemplated that they will acquire those interests at some time beyond the period prescribed by the rule against remoteness of vesting the rule is not infringed; they will not acquire those interests by virtue of any

[26] Gray, *The Rule Against Perpetuities* (4th ed., 1942), s. 201. "No interest is good unless it must vest, if at all, no later than 21 years after some life in being at the creation of the interest."

grant made by the original settlor who created the trust—they will acquire them by transfer from existing beneficiaries under the trust.

Usually a unit trust will provide for its winding up by a certain date within the period allowed by the rule against remoteness of vesting. Some deeds fix the duration of the trust at less than twenty-one years. The period of twenty-one years is the period in gross permissible under the rule against remoteness of vesting where lives in being are not used as measures. The duration could be fixed as the duration of the lives of a reasonable number (say twenty) of identified persons alive at the date of the creation of the trust and still be within the period prescribed by the rule against remoteness of vesting.

In the case of a fixed trust there may be a positive advantage in limiting the period of operation to a stated period of years. It may happen that by the time that period ends the portfolio of investments in the trust is no longer the most satisfactory obtainable. The limitation on the period of operation allows an opportunity for reconstitution of the trust.

It seems, however, that, as a matter of law, it is not necessary to limit the duration of the trust to a period within that prescribed by the rule against remoteness of vesting. That rule is concerned with the commencement of interests and not with their duration.[27] The principle limiting the duration of trusts for non-charitable purposes to a period within that prescribed by the rule against remoteness of vesting would seem to be inapplicable to unit trusts. The vice which in the case of the anomalous non-charitable purpose trust requires the principle limiting their duration is that there is no person who can put an end to the trust. That vice is not present in the case of the usual form of unit trust; all beneficiaries have vested interests and they could come together to put an end to the unit trust by asking for a transfer of the legal title to the securities to be made to them.[28]

Finally, the policy favouring freedom of alienation of property is carried into effect by the law against prolonged accumulation of income.[29] In many unit trusts there is no provision for

[27] Morris and Leach, *The Rule Against Perpetuities* (1956) pp. 313–316.

[28] There does not appear to be any British decision directly on this question in relation to unit trusts. See, however, *Howe* v. *Morse* (1899) 174 Mass. 491; 55 N.E. 213 (Supreme Judicial Court of Massachusetts), a decision relating to the analogous type of Massachusetts trust in which the validity of such a trust was upheld, notwithstanding that its duration was not limited to a period within that prescribed by the rule against remoteness of vesting. The draftsman of the precedent in 20 *Conveyancer* (N.S.) 765 has limited the period of his trust to 21 years. In the note to p. 776, however, he suggests that "it could be argued that the perpetuity period does not apply to the absolute vested interest of the sub-unit holders."

[29] Law of Property Act, 1925 (Eng.), ss. 164–166. Conveyancing Act, 1919–1954 (N.S.W.), ss. 31, 31A. Property Law Act, 1958 (Vic.), ss. 164–166. Law of Property Act, 1936–1956 (S.A.), ss. 60–62. Property Law Act, 1952 (N.Z),

accumulation of income and this part of the law does not come into question. Some unit trust schemes, however, provide for a dividend equalisation account designed to ensure a steady increase in capital value in lieu of flexible dividend rates. Such a scheme involves an accumulation of income and the question arises whether that accumulation must be limited to a period prescribed by the statutory law on accumulations.[30]

This question was answered in England in *Re A.E.G. Unit Trust (Managers) Ltd.'s Deed*.[31] The material provisions of the trust deed in that case were as follows. Clause 20 (c) provided that the accounts of the trust were to be made up as at December 31 in each year and the net income of the trust in each accounting period (subject to certain usual adjustments) became available for distribution to unit holders. Clause 20 (d) provided that, as soon as the amount available for distribution in respect of any accounting period had been computed, the managers should decide in their discretion the amount (if any) to be distributed. Any balance of the amount available for distribution was to be added to capital and would thereupon cease to be available for distribution. Wynn-Parry J. held that section 164 of the Law of Property Act, 1925, did not apply at all to the trust deed.

His lordship's first reason was based on the opening words of section 164. They are: "No person may by any instrument or otherwise settle or dispose of any property . . . ." In his lordship's view the word "settle" had no application in this case. He then considered whether the transaction by which an investor applied for units and became a certificate holder could be a disposition of property within these opening words and concluded that it could not. With respect, it may be observed that the transaction by which an investor became a certificate holder was merely a partial transfer of the beneficial or equitable interest under a pre-existing trust. In the context of this case the transaction with which section 164 might be concerned was the original creation of the trust. This was when the managers transferred securities to the trustee to be held on trust for the managers in the first place and the nominees of the managers (under the description of certificate holders). Such a transaction would not be outside the opening words of section 164.

Secondly, his lordship considered whether the trust deed fell within the mischief at which section 164 was aimed. In deciding that it did not he relied on dicta of Turner V.-C. in *Bassil* v. *Lister*[32] in which it was decided that life assurance policies were not within the Accumulations Act, 1800. The ground of that decision was

ss. 41, 42. In Queensland, Western Australia and Tasmania the Accumulations Act, 1800 (Eng.), is still in force.

[30] *Supra*, note 29.

[31] [1957] Ch. 415.

[32] (1851) 9 Hare 177, 183–184. Criticised in Jarman, *Wills*, 8th ed., pp. 408–411.

that the transaction was by way of contract between the person effecting the policy and the life insurance company.

It is difficult to see why the transaction whereby the manager creates the unit trust, which is clearly a disposition of property, should be governed by considerations appropriate to a policy of life assurance which is in no sense a disposition of property. Perhaps the reliance on *Bassil* v. *Lister* is explicable on the basis that his lordship was, as in his first inquiry, directing his attention to the transaction undertaken by investors who desired to become certificate holders rather than the transaction by which the unit trust was originally created.

It is his lordship's third reason for his decision which is likely to be the most authoritative. As his lordship put it:

> "The basic trust is to be found in clause 12 of the trust deed, which provides: 'The trustee shall stand possessed of the deposited property upon trust for the certificate holders according and subject to the provisions of this deed, and any moneys forming part of the deposited property shall from time to time be invested at the direction of the managers in accordance with the provisions herein contained.' It is true that there are express provisions setting out circumstances in which the trust will come or be brought to an end, and there are express provisions for modification of the trust deed by resolution of a specified majority of the certificate holders at meetings convened for the purpose. But it cannot be doubted that, if at any time the whole of the certificate holders required the trust to be terminated or altered in a specific request, effect would have to be given to their requirements. Equally, if in any given year all the certificate holders required that the balance of the amount available for distribution should not be added to capital as contemplated, effect would have to be given to their requirements."[33]

Interests of Companies in Which Unit Trusts Hold Shares—Voting Powers[34]

The emergence of a device whereby a large amount of previously unorganised capital is made available for company financing should be an advantage to companies. Increased demand for a company's shares increases their market value and can bring nearer the possibility of raising finance at low interest by new issues of shares at a premium.

Some companies, however, have had misgivings about unit trust holdings. This brings into question the manner in which voting rights attached to unit trust holdings are exercised. Because the trustee is the person registered as the owner of the shares and is

[33] [1957] Ch. 415, 422.

[34] I am indebted to Mr. J. G. Monroe, a member of the Middle Temple and of Lincoln's Inn, for valuable comments relating to the following discussion of trustees' voting powers.

a member of the company, he would ordinarily be the person entitled to vote at meetings of the company.[35] In exercising that power he would be under a duty to act so as to promote the interests of his beneficiary. Where an investment company holds shares, the investment company is both the legal owner and the beneficial owner of the shares, and neither an individual shareholder in the investment company nor all the shareholders collectively have the power to dictate directly how the shares held by the investment company will be voted unless the articles of association of the investment company confer that power. But suppose that beneficiaries under a trust who are *sui juris* and absolutely entitled are agreed as to the way in which shares held by the trustee should be voted, must the trustee comply with their voting directions? English authority says he must comply.[36] This subjection of the trustee to control by his beneficiaries is not based on any view that the trustee is an agent for the beneficiaries[37]; it follows from the acceptance by the courts of the view that a beneficiary who is *sui juris* and absolutely entitled is an equitable owner of the trust property rather than a person with a mere personal claim against a trustee.[38] As equitable owner he is entitled to exercise those powers incidental to ownership which would be his if the trust were terminated by transfer of the trustee's title to him.[39]

But even where the whole beneficiary is *sui juris* and absolutely entitled the trustee must exercise his voting power according to his discretion in the best interests of the beneficiary unless and until the beneficiary directs him to vote in a certain way.[40]

[35] *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878) 9 Ch.D. 610.

[36] *Kirby* v. *Wilkins* [1929] 2 Ch. 444 at p. 454; *Butt* v. *Kelson* [1952] Ch. 197 in which Romer L.J. said (at p. 207): "What I think is the true way of looking at the matter is that which was presented to this court by" [counsel for the defendants] "that is that the beneficiaries are entitled to be treated as though they were the registered shareholders in respect of trust shares, with the advantages and disadvantages (for example, restrictions imposed by the articles) which are involved in that position, and that they can compel the trustee directors if necessary to use their votes as the beneficiaries, or as the court, if the beneficiaries themselves are not in agreement, think proper, even to the extent of altering the articles of association if the trust shares carry votes sufficient for that purpose."

See *Re Whichelow* [1953] 2 All E.R. 1558, in which Upjohn J. stated that *Butt* v. *Kelson* was "difficult to reconcile with" earlier authority.

[37] *Supra*, note 6.

[38] *Re Marshall* [1914] 1 Ch. 192; *Re Sandeman's Will Trusts* [1937] 1 All E.R. 368; *Re Weiner* [1956] 1 W.L.R. 579.

[39] *Re Brockbank* [1948] Ch. 206 decided that beneficiaries absolutely entitled and *sui juris* could not dictate the way in which a trustee should exercise a power of appointing new trustees.

Re Brockbank can be reconciled with the cases referred to in note 36 (*supra*) on the basis that the beneficiary's directing power is confined to the exercise of powers which would be his if the trust were terminated by transfer of the trustee's title to him.

[40] *Kirby* v. *Wilkins* [1929] 2 Ch. 444 at p. 454. Contrast the position in Pennsylvania where there is a statutory provision that a passive trustee cannot exercise voting powers and that the real owner is to exercise those powers. *Scott on Trusts*, 2nd ed., s. 193.1, note 9.

An ordinary trustee is required to exercise an active discretion on the question of voting trust shares. Trustees of unit trusts, like any other trustees, would be bound on each occasion on which the question of voting arose to consider their course of action and to reach a conclusion in relation to each such occasion. A settled policy of not voting could constitute a breach of trust. This fiduciary responsibility attached to the voting of shares could make non-voting shares specially attractive to less responsible promoters of unit trusts.

The foregoing discussion assumes that there is no term in the trust deed providing that the trustee shall vote as directed by the settlor or by a beneficiary or by a third person. In a unit trust deed it is usual to provide that the voting rights and the powers of engaging in shareholders' actions and meetings shall be exercised by the manager and that the trustee shall when requested to do so by the manager execute powers of attorney and proxies to the order of the manager. It is sometimes also stated that the manager shall not be liable to any holder of a unit or the trustee for not exercising voting or other rights and that no unit holder shall have any right with respect to any unit to attend meetings of shareholders or to vote or to take part in or consent to any corporate or shareholders' action. Sometimes the clause provides that the voting rights "shall" be exercised by the manager; sometimes it provides that the voting rights "may" be exercised by the manager. Such a clause is, of course, subject to the articles of association of each company. In jurisdictions where it is possible for the articles to restrict the power to appoint proxies in such a way that only a member of the company can be appointed a proxy, the efficacy of a delegation-of-voting-power clause in the unit trust deed may be impaired. In the United Kingdom, however, it is not possible for a company to make an effective provision of this kind in its articles.[41]

What is the legal effect of the clause in the unit trust deed under which the voting power is to be exercised by the manager? So far as the original unit holder is concerned his entry into the arrangement would bind him contractually to permit the trustee to vote as directed by the manager without reference to unit holders. Under many unit trust deeds the only available market for a unit holder desiring to retire from the arrangement is provided by the undertaking of the manager to repurchase units. A new purchaser of units from the manager would also be bound contractually in a similar manner. If units can be sold directly from a unit holder to a new investor the latter would take subject to equities and be subject to the restriction on his ability to direct the trustee as to the exercise of his voting powers.

So far as the manager is concerned if this clause had only

[41] Gower, *Company Law*, 2nd ed., p. 442; Companies Act, 1948 (Eng.), s. 136.

contractual force it would, at common law, be a mere revocable agency and failure on the part of the trustee to allow the manager to vote would, at the highest, be merely a breach of contract for which damages would be recoverable. However, courts of equity would not permit the principal to revoke a power of attorney given for valuable consideration.[42] If the trustee of a unit trust is paid for his services by the manager the requisite valuable consideration would appear to be present. If the manager held the beneficial interest in any of the shares held by the trustee, another basis for preventing the trustee exercising the power to vote without the concurrence of the manager would be breach of trust. The manager would be entitled to the usual equitable remedy of injunction as a beneficiary under the trust. In America, where the terms of the trust provide that the settlor shall have the right to vote with respect to the shares held in trust, the settlor can compel the trustee to give him a proxy.[43]

It was suggested to the Board of Trade Committee of 1936 that companies, in which unit trusts held a considerable proportion of the shares the voting rights of which were controlled by managers of unit trusts, might suffer both by the divorce of control from beneficial ownership and possibly by concentration of power in an association of managers of unit trusts.[44] The Committee proposed that in a summary of information which should be filed with the Registrar of Companies by the manager of each unit trust it should be stated by whom the exercise of voting rights would be controlled and what, if any, right a unit holder would have to control the exercise of such voting power. The Committee, while not suggesting that it should be made compulsory, was of the opinion that there should be provision to give a holder or holders of an appreciable quantity of units the right to direct how the votes attached to his or their holding should be exercised.[45] The Committee opined, however, that these proposals did not get over the basic difficulty that by means of the unit trust there may be a great concentration of voting power in the hands of persons having no beneficial interest.[46]

The Committee's recommendations in relation to voting power were not included in the Prevention of Fraud (Investments) Act, 1939 (Eng.), or its successor the Prevention of Fraud (Investments) Act, 1958 (Eng.).[47]

[42] *Bromley* v. *Holland* (1802) 7 Ves. 3, *per* Lord Eldon at p. 28.
[43] *Scott on Trusts*, 2nd ed., s. 193.1.
[44] Cmd. 5259, para. 45. Cited hereafter as "Board of Trade Report."
[45] *Ibid.* para. 92.
[46] *Ibid.* para. 48.
[47] In Victoria among the covenants by the manager implied into every unit trust deed under the Companies Act, 1958, s. 63 (*b*) there is one "that the company [*i.e.*, the managing company] will not exercise the right to vote in respect of any shares held by the trustee or representative at any election for directors of a company whose shares are so held without the consent of the holders of the interests to which the deed relates given at a meeting of holders" summoned in the prescribed manner "for the purpose of authorising the exercise

In jurisdictions where it is still possible for a company to provide that a proxy must be a member of the company, the company can exercise some control over the managers of unit trusts. In those jurisdictions it would be necessary for the manager of the unit trust to hold shares directly in its own name in the company in order to be a proxy. In 1956 a public company incorporated in New South Wales, namely, Clyde Industries, Ltd., attempted to control the voting of its shares held in unit trusts by another method. The company sought to introduce into its articles of association a provision that if any member of the company held ordinary shares as a trustee for unit holders that member would not be able to cast a vote upon a poll unless he had received the direction of a majority of all the unit holders as to the particular manner in which such vote was to be cast and that he was to vote then only in accordance with the particular direction given to him. The chairman of any meeting at which a poll was demanded was to allow a period of at least twelve days within which the trustee could obtain the directions. The directors could require such evidence as they might deem proper in the circumstances to ensure that the provisions of the article had been duly complied with by the trustee. A resolution of the directors that the member had not complied with the article was to be conclusive and binding upon all members of the company and the directors were not to be bound to give reasons for their decision. The article was not to affect the right of any member to be present at any meeting or to vote thereat upon a show of hands. Nor was the clause to affect the voting rights of members in respect of shares which they held as trustees for persons other than unit holders. The company felt that the growth of shareholdings on behalf of unit trusts was a threat to public companies, because it was thought to be prejudicial to the continuance of able executive management.[48] The company was also concerned

of the right to vote in a particular case." This provision is concerned only with exercise of voting power for the narrow but important purpose of electing directors. Presumably the provision does not go so far as to require a company in which a unit trust holds shares to inquire whether any vote of a manager is in breach of this covenant before voting would be a breach of contract and a breach of trust. *Quaere* whether this provision takes from the trustee the discretion as to voting which belongs to him by virtue of his being trustee. The provision is concerned only with the exercise of the *manager's* right to vote. This Victorian provision by assimilating the manager to an agent of the holders of units blurs the distinction between trust and agency, a distinction which, apart from statute, is important in keeping unit trusts outside the category of illegal partnerships.

In a Western Australian Bill of 1957 (Bill to amend the Companies Act, 1943–1954 (W.A.), clause 12 inserting new s. 370A (6) (*d*)) which eventually lapsed, the provisions about voting power were declaratory of the general equitable principle that the trustee shall exercise his powers in the interests of the beneficiary. The provisions then sought to maintain this position by providing that the trustee was not to be influenced by any party as to the manner in which he exercised any voting rights.

[48] In this case, of the company's ordinary shares issued to the number of 1,981,918, approximately 292,200 ordinary shares were held by unit and other similar trusts.

about the inclusion of shares in competing companies in the portfolios of unit trusts.

Suits were commenced on behalf of a number of unit trusts holding approximately 150,000 shares in Clyde Industries, Ltd., to prevent the company and its directors from acting upon any proposed resolution purporting to amend the articles of association so as to include the proposed provision. Following undertakings given on behalf of the company that there would be no declaration of the poll in respect of the new special resolution until the hearing of the suits, the company meeting was held and a majority of votes was cast in favour of the resolution for including the new article.[49] The grounds upon which the proposed resolution had been attacked were (1) that it was not a valid exercise of the power of amending the articles given by section 20 of the Companies Act, 1936 (N.S.W.); (2) that it involved a modification of the class rights of the ordinary shareholders and that the provisions of an article (dealing with the modification of class rights) had not been complied with; and (3) that the proposed resolution was in conflict with section 84 of the Companies Act, 1936 (N.S.W.), which provided that no notice of any trust should be entered on the register or be receivable by the Registrar-General.[50]

McLelland J.[51] held for the plaintiffs on the first ground after applying the principle in *Greenhalgh* v. *Arderne Cinemas, Ltd.*,[52] that in passing any resolution to alter articles of association, the shareholders must proceed upon what, in their honest opinion, is for the benefit of the company as a whole, that is, for the benefit of the corporators as a general body: what the shareholders are to consider is the benefit of a hypothetical shareholder who has no personal interests conflicting with those of the company, and if the resolution discriminates between the majority and the minority it would be liable to be impeached. In the *Clyde Industries* case, the shareholders had not satisfied the requirements of that principle. The proposed article was aimed only at a certain type of shareholder, namely, a custodian trustee. The right of a shareholder custodian trustee to vote had been greatly reduced in effectiveness. In so far as it had been made less effective, the right to vote by other shareholders had been made more effective and valuable. Thus the article discriminated between the majority of the shareholders and the minority so as to give the former an advantage of which the latter were deprived. There were no grounds on which reasonable men could decide that the article confined in its terms to the plaintiff shareholders was for the benefit of the company as a whole.

[49] There were 95,514 votes representing 1,289,217 shares in favour, and 17,870 votes representing 398, 239 shares against.

[50] *Cf.* Companies Act, 1948 (Eng.), s. 117.

[51] [1959] S.R.(N.S.W.) 33.

[52] [1951] Ch. 286.

A custodian trustee's right to vote had been made less effective in various ways. The article was to be applied trust by trust so that in respect of shares held by one trust the majority referred to in the proposed article was the majority of holders beneficially entitled under that trust. The custodian trustee could not record a vote in respect of the shares held by it in the company, considered as a whole, unless the majority of the holders in each and every trust gave the same directions. The majority direction was to be a majority of unit holders irrespective of the amount invested by a holder so that a direction under the article could represent the direction of a minority in interest. The article deprived the custodian trustee of the right to vote at a poll and only allowed it to record as a vote the majority direction of the holders and did so without taking into account what rights the minority might have had under the trust to have the custodian trustee exercise its own discretion. Furthermore, whether a vote could be recorded would always depend on the directors, who could prevent it from being given without giving reasons. On the evidence, moreover, the custodian trustee could never feel reasonably sure that it could get a majority direction within the time prescribed by the articles.

Dealing with the company's fear that a unit trust could hold shares in a number of competing companies McLelland J. pointed out that the holding of shares by one person in more than one public company whose businesses compete is not a characteristic confined to custodian trustee shareholders. Moreover, the company's point that the unit holders provide the capital to purchase the shares and are the only persons beneficially interested in them and yet may not interfere in the management and may not effectively complain of the use made of the voting power by the trustee was met by the statement that there was no essential difference between the position of holders under unit trusts and the position of beneficiaries under many common forms of trust instruments. The trustee would be subject to the usual liability of a trustee in relation to exercise of voting powers and the holders as beneficiaries could take action in relation to improper exercise of discretion. The company had also pointed out that under the relevant unit trust deeds each manager had the right to direct the trustee as to how the voting power should be exercised, that the manager received at the outset a commission to cover all that the manager had done or might do and had, it was said, nothing to gain from considering the interests of the holders, and, unsold and redeemed units apart, had no financial interest at stake in the trust property. This comment, however, ignored the fact that the managers were under an obligation to repurchase units and sub-units and had, therefore, a real interest in the trust property.

It is noteworthy that it appeared from the *Clyde Industries* case

that none of the plaintiff trustees had ever exercised their respective rights to vote at meetings of the company.[53]

What would be the effect of including an article of the kind proposed in the *Clyde Industries* case in the articles of association of a company when it is first incorporated? Such a situation would raise the question whether this was in conflict with legislation similar to section 84 of the Companies Act, 1936 (N.S.W.), which provides: "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the Registrar-General." In the *Clyde Industries* case it was not necessary to deal with this question.

The Interest of the Potential Unit Holder

In the absence of specific legal regulation both the unit trust and the investment company would provide opportunities for unscrupulous promoters to take advantage of inexperienced investors. Some protection for shareholders in investment companies is provided in company legislation designed to ensure that ultimate control of the company's affairs should be in the hands of the shareholders.

One way in which legislative regulation could give protection to potential unit holders would be to empower unit holders to control the trustee and manager. But as has been seen earlier if unit holders have a high degree of control the arrangement may create an agency relation. The United Kingdom legislation does not attempt to give the unit holders control over the manager or trustee. It regulates the choice of trustee with a view to securing a responsible trustee[54] and then puts on the trustee a number of

[53] In the *Sydney Morning Herald*, November 3, 1956, the general manager of another company managing unit trusts was reported as saying that "in nine years' operation, Security Units had not exercised a single vote at any company meeting. It would do so only when it felt that the interests of unit holders were in jeopardy."

[54] The Prevention of Fraud (Investments) Act, 1958, s. 1, provides that a person shall not carry on the business of dealing in securities (including interests under any unit trust (s. 26)) without a licence. These restrictions, however, do not apply to any person acting in the capacity of manager or trustee under an "authorised unit trust" (s. 2). An "authorised unit trust scheme" means a unit trust scheme declared to be authorised by the Board of Trade (s. 26). Among the conditions to be fulfilled before a unit trust can become an authorised unit trust scheme are certain conditions relating to the identity of the manager and the trustee respectively under the scheme (s. 17). Each of the persons who are respectively manager and the trustee under the scheme must be a corporation incorporated under the law of some part of the United Kingdom, and must have a place of business in Great Britain at which notices and other documents are received on behalf of the corporation. The scheme must be such that the effective control over the affairs of the corporation which is the manager under the scheme will be exercised independently of the corporation which is the trustee under the scheme. The corporation which is to be the trustee under the scheme must satisfy one of two conditions. First, that the corporation has a capital (in stock or shares) for the time being issued of not less than £500,000, of which an amount of not less than £250,000 has been paid up, and that the assets of the corporation are sufficient

responsibilities to supervise the activities of the manager. The trust deed must contain a provision requiring the manager to retire from the trust if the trustee certifies that it is in the interest of the beneficiaries that he should do so.[55]

By contrast, the Victorian legislation, while regulating managers and trustees,[56] also adopts the principle of control by the unit holders. It requires the trust deed to provide for meetings of unit holders to be convened on the requisition of not less than 10 per cent. of the number of holders for the purpose of having accounts laid before the meeting and for the purpose " of the meeting giving to the trustee . . . such directions as the meeting thinks proper." [57] The exact scope of this control is not clear. Presumably the meeting could give directions only as to matters which are within the trustee's power under the trust deed or the Act. The Act also provides that the trustee may be removed by a majority decision of unit holders.[58]

Control of advertising material under the United Kingdom Act is confided to the care of the trustee; the trust deed must provide for securing that advertising matter shall be subject to scrutiny and rejection by the trustee.[59] The Victorian Act tends to equate unit trusts to companies by requiring the manager to issue a statement in writing which is to be governed by the provisions of the Act relating to prospectuses.[60] In the case of a share-unit trust the statement is required to provide information concerning (*inter alia*) the method of calculation of the price of units to investors, the manager's obligations to repurchase units and the method of calculation of the price of repurchase, the remuneration

to meet its liabilities (including liabilities in respect of the repayment of its capital). The alternative condition is that more than four-fifths of the capital of the corporation is held by another corporation being one in relation to which the requirements as to capital and assets specified in the first condition are fulfilled. These provisions as to the status of trustees were first enacted in 1939 and follow the recommendations of the committee which reported to the President of the Board of Trade in 1936. That committee recommended the qualifications now set out in the first condition. It also recommended that a trustee should not be debarred from holding the securities constituting a trust in the name of a nominee company provided that such nominee company transacted no other business than the holding of securities in trust and that its capital was wholly owned by the trustee company. The second condition contained in the Act of 1958 apparently represents a partial implementation of this recommendation. (Board of Trade Report, para. 56.) On the discretion of the Board of Trade to refuse to make an order declaring a unit trust to be an " authorised unit trust scheme " see *Allied Investors' Trusts* v. *Board of Trade* [1956] Ch. 232.

55 Prevention of Fraud (Investments) Act, 1958 (Eng.), s. 17, Sched. I, para. 7.

56 In Victoria under the Companies Act, 1958, s. 63, no person except a public company or its agent authorised in that behalf under the seal of the company may issue or offer units to the public. Unlike the United Kingdom provision it is not necessary for the trustee to be a corporation but the Victorian law requires the approval of the Attorney-General to appointments of trustees.

57 Companies Act, 1958 (Vic.), s. 63 (6).

58 *Ibid.* s. 63 (5) (*c*).

59 Prevention of Fraud (Investments) Act (Eng.), 1958, s. 17, Sched. I, para. 3.

60 Companies Act, 1958 (Vic.), s. 63 (3).

of the trustee and the manager and, if any reference is made to the yield of income to be obtained by unit holders, a statement indicating how that yield is calculated.[61]

An obvious danger to potential investors in a unit trust is that units will be sold without there being any trust property in existence. In the United Kingdom the trust deed must provide that no unit certificate shall be issued until steps have been taken, to the satisfaction of the trustee, to secure that the property will be vested in him or a nominee for him approved by the Board of Trade.[62]

The United Kingdom legislation also provides that the Board of Trade may appoint inspectors to investigate any unit trust if it is in the interests of unit holders and the matter is one of public concern.[63]

The rights of a unit holder against the manager and the trustee stem from the trust deed. This document will ordinarily be prepared by the manager and the trustee; a unit holder will not have had any influence on its contents. In this respect a unit trust deed is similar to a debenture trust deed. On general equitable principles there is no limit to the protection which a trustee may be given by the inclusion in the trust deed of provisions absolving him from liability for any negligent breach of trust. But general equitable principles about trusts arose mainly in regard to family arrangements of property and donative transactions rather than commercial bargains. Moreover, they were developed before the emergence of professional trustees holding themselves out as skilled managers. In the United States a doctrine has developed under which an exculpatory provision may be held to be ineffective to give the trustee protection if it is against public policy to give him that protection: regardless of how wide the provision may be, a trustee will be liable if he commits a breach of trust in bad faith or intentionally or with reckless indifference to the interests of the beneficiaries, or if he has personally profited through a breach of trust.[64]

In the realm of company law complaints made to the Cohen Committee about inactive trustees under debenture trust deeds[65] led eventually to the enactment of section 88 of the Companies Act, 1948 (Eng.). That measure invalidates any provision in a debenture trust deed so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care and diligence required of him as trustee. The limited effect of section 88 becomes apparent when it

[61] *Ibid.* Sched. VII.
[62] Prevention of Fraud (Investments) Act, 1958 (Eng.), s. 17, Sched. I, para. 2.
[63] *Ibid.* s. 12.
[64] *Scott on Trusts*, 2nd ed. s. 222, 3. In New York the Decedent Estate Law, s. 125, requires any attempted grant to an executor or testamentary trustee of immunity for failure to exercise reasonable care, diligence and prudence to be deemed contrary to public policy. Note (1936) 6 Brooklyn L.Rev. 89.
[65] Cmd. 6659, paras. 61–64.

is contrasted with the more stringent provisions of the Trust Indenture Act, 1939, enacted by Congress in the United States.[66]

But at least it recognises that legal regulation should go beyond preventing prospective debenture holders being misled into the mistaken belief that they can safely leave management of their claim in the hands of a responsible trustee: it is necessary that a person who purports to be a trustee will be under an irreducible minimum of obligations.

The case for legislative control of exculpatory provisions in unit trust deeds is stronger than that relating to debenture trust deeds. When an issue of debentures is underwritten by a broker his scrutiny of the debenture trust deed will usually be in the same interest as that of potential debenture holders but there is no similar possibility of vicarious assurance in relation to a unit trust. Moreover, the investor in most types of share-unit trust is an investor of risk capital and is dependent on a trustee and manager for a much wider range of management than is required of a trustee for creditors.

One clear advantage of investment in the shares of an investment company is that the liability of the shareholder is limited.

If, as is usual in the ordinary unit trust, each unit holder is absolutely entitled to his undivided share of the beneficial interest he could become personally liable to indemnify the trustee for liabilities properly incurred in administering the trust property.[67] It might be thought that the decision of the Judicial Committee of the Privy Council in *Wise* v. *Perpetual Trustee Co., Ltd.*,[68] that members of a club were under no personal liability to indemnify trustees of club property would apply in favour of unit holders. But an essential ingredient of the Board's opinion was that clubs were not "associations for gain."[69] Unit trusts are not associations but they are profit-making ventures and this circumstance might exclude *Wise* v. *Perpetual Trustee Co., Ltd.*

Thus if, under a share-unit trust deed, the manager or trustee may invest in shares which are partly paid-up there is the possibility that the unit holder will have to reimburse the trustee for calls paid.[70] In relation to a land-unit trust it is not difficult to envisage occasions for the trustee incurring liabilities.

H. A. J. Ford.*

[66] Note, 25 Cornell L.Q. 105. Stevens, *Handbook on the Law of Private Corporations*, 2nd ed., s. 196.

[67] *Hardoon* v. *Belilios* [1901] A.C. 118. The right of the trustee to indemnification might be expressly limited to recourse against the trust property by special trusts or by contract: [1901] A.C. at p. 127.

[68] [1903] A.C. 139.

[69] *Ibid.* at p. 149.

[70] *Quaere* whether Trustee Act, 1925 (Eng.), s. 16, would confer borrowing powers on a trustee of a unit trust.

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BLASPHEMY IN IRISH LAW [1]

PROSECUTIONS for blasphemy are, to say the least of it, rare and far between in the modern common law world. This gives particular interest to the recent refusal of an Irish District Justice to commit a Dublin theatrical producer for trial on a charge of having produced for gain, in May 1957, performances of Tennessee Williams' play *The Rose Tattoo* [2] which were indecent and *profane* [3] and obscene, at the Pike Theatre, Dublin.[4] Although, as the District Justice pointed out, a person convicted of any of these offences could be sentenced to an unlimited period of imprisonment, little evidence was in fact brought forward by the prosecution directly to establish the charge of profanity. Nor was any definition of the offence offered by counsel. The District Justice stated that the offences charged were common law offences. The major part of the preliminary investigation was concerned with an attempt to establish prima facie evidence of obscenity. This the prosecution

[1] There is little material on this topic. In addition to works cited elsewhere the following have been referred to:

W. T. Ayres, *A Comparative View of the Differences Between the English and Irish Statute and Common Law* (Dublin and London, 1780), 2 vols. (especially vol. 2, Bk. 2, Chap. 4: "Offences Against God and Religion"); Paul Blanshard, *The Irish and Catholic Power: An American Interpretation* (Boston, 1953, and London, 1954) (references are to the London edition); G. Gavan Duffy, *Digest of the Criminal and Quasi-Criminal Law, Part II: District Court* (Dublin 1925), p. 29; J. A. Froude, *The English in Ireland in the Eighteenth Century*, New Impression, Silver Library Edition (London, 1906), 3 vols.; E. Hayes, *Crimes and Punishments, Or A Digest of the Criminal Statute Law of Ireland* (2nd ed., Dublin, 1842), 2 vols. (especially vol. 2, pp. 515–518); J. O'Connor, *The Irish Justice of the Peace* (Dublin, 1911), pp. 795 and 878; W. A. Breakey, *Handbook of the Common and Statute Law of Ireland* (Dublin, 1895), p. 35; N. Robbins, *An Exact Abridgment of the Statutes in Force in Ireland relating to Ecclesiastical Matters, etc.* (Dublin, 1751); E. Bullingbroke, *Ecclesiastical Law, etc.* (2 vols., Dublin, 1770), vol. 2, pp. 1400–1404.

On blasphemy generally, see:

H. B. Bonner, *Penalties Upon Opinion; Or Some Records of the Laws of Heresy and Blasphemy* (3rd ed. by F. W. Read, London, 1934); C. S. Kenny, "The Evolution of the Law of Blasphemy," 1 *Cambridge Law Journal* (1921–23), pp. 127–142; G. D. Nokes, *A History of the Crime of Blasphemy* (London, 1928).

For a criticism of laws against blasphemy, see J. B. Bury, *A History of Freedom of Thought* (London, 1913), especially pp. 243–246.

[2] London, 1955; New York, 1951.

[3] The charge here was of profanity, but it seems that profanity is equivalent to and synonymous with blasphemy. See Nokes, *op. cit.*, pp. 35, 38, 46, 82, 86, for evidence to support this conclusion. Profanity is treated as indistinguishable from blasphemy in such Irish works as E. Bullingbroke, *The Duty and Authority of Justices of the Peace, etc.* (revised edition, by J. Goddard, Dublin, 1788), pp. 90–91, and J. Gabbett, *A Treatise on the Criminal Law, etc.* (2 vols., Dublin, 1843–44), vol. I, p. 72.

[4] The whole proceedings were reported in the *Irish Times* (Dublin) on the following dates: May 25; July 5, 9, 12 and 16; December 12, 16, 17, 18 and 19, 1957; April 23, 25 and 26; May 16 and 24; June 4, 6 and 10, 1958. See also *Attorney-General* v. *Simpson* (1959) 93 Ir.L.T.R. 33.

failed to do to the satisfaction of District Justice O'Flynn who made a most important review of the law with regard to obscenity in Ireland, in his speech refusing informations.

It should be noted that in this case the District Justice seems to have regarded profanity and obscenity as similar, if not identical, offences. The charges against Simpson consisted originally of three separate counts of producing an indecent and profane play on different occasions. At the request of the prosecution the District Justice allowed the word " obscene " to be substituted for the word " profane " in two of the counts.[5]

The case leaves open the question, whether Irish law, to quote Professor Kenny's words,

> " . . . rendered punishable all open expressions of a disbelief in Christianity, or only such as were couched in language so irreverent and scurrilous as to be likely to offend ordinary Christians deeply enough to provoke some of them to a breach of the peace. To put it briefly, could the mere matter of an expression of disbelief constitute it an offence of criminal blasphemy, or would the offence arise only when the *Matter* was aggravated by the *Manner*? " [6]

A perusal of the evidence for the prosecution in this case suggests that it was the belief of the prosecution that certain matters were in themselves, without more, blasphemous or profane.

The case thus raises the important problem of what constitutes a blasphemous offence in Irish law. This is especially important because the Constitution of the Republic of Ireland qualifies the constitutional guarantee of the right of citizens to express freely their convictions and opinions, by the following proviso:

> " The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law." [7]

In interpreting this Constitution one is entitled to look at the Constitution as a whole, and it should be noted that the Preamble clearly indicates the Christian inspiration of the whole:

[5] 93 Ir.L.T.R. 33 at 35.

[6] Kenny, *op. cit.*, p. 128.

[7] *Constitution of Ireland*, Art. 40. 6. I. i. It may perhaps be pointed out that some people believed that this proviso did not go far enough, *e.g.*, Dr. Cornelius Lucey wrote of this proviso: " Were the word ' anti-religious ' inserted after the word ' blasphemous ' in the last sentence, this article would be as perfect as we could expect it to be. We would like the addition of this word ' anti-religious ' simply because we are not sure that the publication of anti-God or atheistic propaganda would be accounted blasphemous in law. . . . There is good reason in this country why the State should tolerate all religions and allow them all freedom of expression. But there is no reason why it should tolerate unbelief or, at any rate, open propaganda on behalf of unbelief ": *Irish Ecclesiastical Record* (Dublin), 5th series, vol. 50 (1937), pp. 584–599, at p. 590. Dr. Lucey's article was entitled " The Freedom of the Press."

See also Donal Barrington, " The Irish Constitution: Freedom of Speech," 80 *Irish Monthly* (1952), pp. 345–351, where, however, no attempt is made to analyse the legal meaning of this clause.

"In the Name of the Most Holy Trinity, from whom is all authority and to Whom, as our final end, all actions, both of men and States must be referred,

"We, the people of Éire,

"Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial. . . ."

Article 44 deals with *Religion*. It provides:

"I. i. The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

"ii. The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens.

"iii. The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and other religious denominations existing in Ireland at the date of the coming into operation of this Constitution." [8]

Did these provisions as a whole alter the pre-existing common law as to blasphemy? It may be noted that while the phrase "Christianity is part of the Law of England" has been discarded as a guide to the problem of what constitutes blasphemy under English law,[9] the Irish Constitution in many respects, it may be argued, gives new meaning to the phrase "Christianity is part of the law of Ireland." The debates in the Dáil at the time when the Constitution was under discussion give little indication of the intention of the Irish Parliament, then consisting only of one chamber, on this matter.[10] It is, however, well known that Mr. Éamon de Valera, lately the *Taoiseach* or Prime Minister of the Republic, himself prepared the first draft of the present Constitution. What was *his intention* in including these provisions? [11] An inquiry was directed to Mr. de Valera as to what was the source of the proviso to article 40. 6. I. i, and whether in the light of the other provisions of the Constitution referred to above a new offence of blasphemy had been created or the old conception of blasphemy modified. The reply elicited was that no new offence had been created by article 40. 6. I. i; that the offence of blasphemy is one

[8] The Constitution came into operation on December 29, 1937.

[9] *Bowman* v. *Secular Society* [1917] A.C. 406.

[10] *Dáil Éireann Debates*, vols. 67 and 68 *passim*. For the view that Art. 44 is merely a statement of fact, see Rev. P. McKevitt, *The Plan of Society* (Dublin, 1944), p. 150. It may be noted that no attempt is made to analyse the legal meaning of this article in J. Blanchard, *Le Droit Ecclésiastique Contemporain d'Irlande* (Paris, 1958).

[11] The Irish Supreme Court has not yet had to decide the question as to what extrinsic evidence is admissible in the interpretation of the Constitution as distinct from the interpretation of statute.

at common law, and that it is impossible to attribute article 40. 6. I. i to any particular source.[12]

The Constitution also provides that the state shall have two official languages, of which Irish is the first.[13] Therefore in endeavouring to collect the meaning of a constitutional provision one must look to the two versions, English and Irish, and, if there is a conflict between them, the Irish is to prevail. In our search to ascertain therefore what the word "blasphemous" in the Irish Constitution means we must look to the Irish version. The word used in the Irish version is "*diamhaslach.*" For the meaning of it one must look to the dictionaries, for it is certainly no term of art in the Irish common law. According to Dineen,[14] the standard modern work, "*diamhaslach*" means "blasphemous, impious."[15] It is only when one goes back to the older dictionaries that one finds a fuller definition, which, however, differs from that accorded to blasphemy, in English law today at any rate. Thus O'Brien defines "*diamhaslach*" as "blasphemous, the reproaching or dishonouring of God, the ridiculing of religion, or speaking evil of holy things."[16]

This does not take one very far, in particular because Mr. de Valera himself originally drafted the Constitution in English; consequently in interpreting the Irish term "*diamhaslach,*" one must do so in the light of the legal meaning, at the time of the drafting of the Constitution, of the English term "blasphemous."

The position, therefore, is that the meaning of blasphemous in the Constitution is first of all considered to be in the light of the state of the Irish law as it was before the Constitution came into force.

Irish Statute Law

In dismissing the charges in the *Rose Tattoo* case the District Justice attached importance to the fact that copies of the printed version of the play were, at the time, freely on sale in Dublin, despite the fact that there were in existence two Censorship of Publications Acts making provision for the prohibition of the sale and distribution of "unwholesome" literature. It therefore appeared that the published version of the play did not infringe the Acts.[17] These Acts do not deal with profane or blasphemous literature; they are concerned largely with obscenity. However,

[12] Letter from the Assistant Secretary, Department of the Taoiseach, Dublin, dated November 24, 1958.

[13] Art. 8. 1 and 2 of the Constitution of Ireland.

[14] P. S. Dineen, *Irish–English Dictionary* (new ed., Dublin, 1927).

[15] To the same effect, see Thomas De Vere Coneys, *Irish–English Dictionary* (Dublin, 1849); *O'Reilly's Irish–English Dictionary* (ed. John O'Donovan, Dublin, 1864) merely says "blasphemous."

[16] *O'Brien's Irish–English Dictionary* (Paris, 1768).

[17] Censorship of Publications Act, 1929 (No. 21 of 1929), and Censorship of Publications Act, 1946 (No. 1 of 1946).

the judgment suggests that the meaning given to obscenity (and profanity or blasphemy) in the operation of a statute may indicate also what is the meaning at common law of these terms.

The Censorship of Films Act, 1923,[18] provides for the grant of a licence for public exhibition, by the Film Censor, unless he is of opinion that the particular film concerned is, *inter alia*, *blasphemous*. The Censorship of Films (Amendment) Act, 1925,[19] gives the Film Censor similar power with regard to the use of advertising material issued to publicise film performances. One might presume, therefore, that, in order to guide him in his work, the Film Censor must employ some criterion as to what constitutes a blasphemous film. It has been alleged that the Italian film *The Miracle* was banned in Ireland in 1950 as blasphemous.[20] However, inquiries directed to the Film Censor, for confirmation of this, and for information as to his interpretation of the term "blasphemous," were referred to the Department of Justice, who stated that there is no record of a Film Censor having refused a certificate on the grounds of blasphemy, or of having had to consider the meaning of "blasphemous" as used in the Censorship of Films Act, and that it is not possible at this stage to say with certainty why in 1950 the then Film Censor (who has since died) refused his certificate to the particular film referred to.[21]

By an English statute, the Blasphemy Act, 1697,[22] it was made a criminal offence for any person having been educated in, or at any time having made a profession of, the Christian religion to assert or maintain that there are more gods than one, or to deny the Christian religion to be true, or the Holy Scriptures to be of divine authority. This Act never applied in Ireland and there is no equivalent Irish statute.[23] Attempts were made to pass such an Act, but the complexities of Irish legislative procedure prevented it from reaching the Statute Book.[24]

Among the relevant statutes applying in Ireland are the Profane

18 No. 23 of 1923.

19 No. 21 of 1925.

20 Blanshard, *op. cit.*, p. 119. This film has been the cause of several judgments in the U.S.A. In *Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, the Supreme Court determined that New York could not ban it as sacrilegious; the Appellate Court of Illinois, First District, held in 1957 that the film was *not* "immoral and obscene": *American Civil Liberties Union* v. *City of Chicago*, 141 N.E. (2d) 56.

21 Letters from the Secretary, Department of Justice, dated October 30, 1958, and February 12, 1959.

22 9 Will. 3, c. 32 (Eng.)

23 See *Chronological Table of the Statutes affecting Northern Ireland* (Belfast, 1956), Part II: "Statutes of the Realm from 1226 to the date of the Union of the Parliaments of Great Britain and Ireland, which affect, or ever affected the territory which is now Northern Ireland," pp. 52–101. If such an Act did apply in Ireland, it might be referred to for evidence of the policy of the law with regard to offences which are to be regarded as blasphemous.

24 See *Journal of the House of Commons of Ireland*, vol. 2, pp. 262, 280, 317, 326 and 329.

Oaths Acts of 1635 and 1695.[25] The latter renders profane cursing or swearing in the presence of a Justice punishable by a fine of one shilling, and in default imprisonment if the offender is a servant, labourer, soldier or seaman, and by a fine of two shillings, and in default imprisonment, in the case of other persons.[26]

The English statute 3 Jac. 1, c. 21, by which persons using the name of the Holy Trinity profanely or jestingly, in any stage play, interlude or show, were made liable to fine of £10, did not apply in Ireland, and there is no corresponding Irish statute.[27] However, the Irish Act of Uniformity, 1568,[28] forbade ridicule of the liturgy of the Established Church. This same Act also repealed a number of early Irish statutes[29] against heresy which had been revived, although never put into operation during the reign of Mary.[30]

The Police Clauses Act, 1847,[31] made it an offence publicly to sell or distribute any profane book, paper, print, etc., or to sing profane songs or to use profane language. The Town Improvements (Ireland) Act, 1854,[32] made a similar provision. The Irish courts have never, it seems, been called upon to decide the meaning of "profane" in these or any other statutes.

Apart from statute, the authorities in Ireland were much concerned, particularly in the seventeenth and eighteenth centuries, with the suppression of blasphemy and heresy. Thus in 1638, Thomas Wentworth, the Lord Deputy in Ireland, issued *Lawes and Orders of Warre for the good Conduct of the Service of Ireland*,[33] which provided:

> "Let no man speake impiously and maliciously against the Holy and Blessed Trinity, or any of the Three Persons, God the Father, God the Sonne, and God the Holy Ghost, or against the true Articles of the Christian Faith, upon paine of Deathe."

In the first years of the eighteenth century the Irish Parliament showed considerable zeal in the suppression of unorthodoxy. In 1697 the Irish House of Commons ordered that John Toland's work, *Christianity not Mysterious*, should be publicly burned, its

[25] 10 & 11 Car. 1, c. 1 (Ir.) and 7 Will. 3, c. 1 (Ir.).

[26] The equivalent English Act, the Profane Oaths Act, 1745 (19 Geo. 2, c. 21), contains a slightly different scale of fines; in particular it divides "other persons" into persons under the degree of gentleman, for whom the fine is two shillings, and persons of or above the degree of gentleman, for whom the fine is five shillings. The Irish statute is silent with respect to gentlemen.

[27] See Gabbett, *op. cit.*, vol. I, p. 73; also "The Law of the Stage in Dublin" (1909) 43 *Irish Law Times and Solicitors' Journal*, pp. 209–210. The Theatres Act, 1843 (6 & 7 Vict. c. 68), did not apply in Ireland.

[28] 2 Eliz. 1, c. 2 (Ir.).

[29] 2 Ric. 2, c. 5; 2 Hen. 4, c. 15 and 2 Hen. 5, c. 7.

[30] 3 & 4 P. & M. c. 9.

[31] 10 & 11 Vict. c. 89, s. 28.

[32] 17 & 18 Vict. c. 103, s. 72.

[33] London, 1638; Dublin (?), 1638.

importation into the county forbidden, and that the author should be prosecuted for blasphemy. Toland escaped trial by flight.[34]

In 1703, John Asgill's work, *An Argument, proving that according to the Covenant of Eternal Life, revealed in the Scriptures, Man may be translated from hence into eternal life without passing through Death, etc.*, was ordered to be burnt by the House of Commons. Asgill himself, being a Member of the House, was expelled and declared forever thereafter incapable of being a Member of that House. He subsequently became a Member of the English Parliament.[35]

In 1711 the Irish House of Lords ordered the burning of the *Sermons*[36] of Joseph Boyse, a Dublin Presbyterian minister and friend of Emlyn, on the ground that they were "false and scandalous" and contained matters reflecting on the episcopal order.[37]

In 1713 the Lower House of Convocation made a complaint to the Irish House of Lords of certain remarks made by Robert Molesworth, a member of the Commons, when the clergy attended in Dublin Castle to present an address to the Viceroy. The words that were complained of were "They that have turned the world upside down, are come hither also."[38] These were declared by Convocation to constitute "an indictable profanation of the Holy Scriptures." The Lords hesitated to take action in a matter properly within the sphere of the Commons, and the dissolution of Parliament put an end to the proceedings.[39]

[34] See John Toland, *Christianity not Mysterious:* or, *A Treatise shewing That there is nothing in the Gospel contrary to Reason, nor above it: And that no Christian Doctrine can be properly call'd A Mystery. To which is Added, An Apology from Mr. Toland, in relation to the Parliament of Ireland's ordering this Book to be burnt* (London, 1702); *Journal of the House of Commons of Ireland*, vol. 2, p. 190. The action taken by Parliament in this case was in part at least due, it seems, to a book published by a Fellow of Trinity College, Dublin, Peter Browne, who, in his work, *A Letter in Answer to a Book entitled Christianity not Mysterious* (Dublin, 1697), wrote: "How far Men in Power, according to their several status, are oblig'd to intermeddle in point of *Conscience*, I shall not now enquire. But sure I am in point of *Policy* it is become no less necessary. For writers of this *Strein* have given broad *hints*, that they are as little friends to our *Government* as our *Religion*. This man can say, 'That magistrates are made for the People,' and everyone knows, what *Doctrines of Rebellion* men are wont to insinuate by this *saying*. . . . Now what would this man have said, if he durst have spoke as plainly of *Government* as he hath done of *Religion?*" (at pp. 208–209).

[35] See Froude, *op. cit.*, vol. I, p. 333; *Journal of the House of Commons of Ireland*, vol. 2, pp. 317 and 333.

[36] Joseph Boyse, *Sermons* (Dublin, 1708).

[37] W. D. Killen, *Ecclesiastical History of Ireland* (2 vols., London, 1875), vol. 2, pp. 212–213. See also article "Joseph Boyse" in *Dictionary of National Biography*.

[38] *Cf.* Acts, xvii, 6. When Paul and Silas were preaching in Thessalonica they met with hostility from certain persons who spoke of the apostles in these terms: "These men who have turned the world upside down have come here also." See Holy Bible: Revised Standard Version.

[39] See Froude, *op. cit.*, vol. I, pp. 395–396; *Journal of the House of Lords of Ireland*, vol. 2, pp. 441–443; *Journal of the House of Commons of Ireland*, vol. 2, p. 773.

In spite of the efforts of Parliament, Convocation remained bitterly discontented with the Government's inactivity in the face of widespread "Infidelity, Heresy, Impiety and Popery."[40]

In 1756 Robert Clayton, Bishop of Clogher, chaplain to the King's Inns[41] and author of *An Essay on Spirit*,[42] which purported to examine the doctrine of the Trinity in the light of reason and nature, proposed in the Irish House of Lords that the Nicene and Athanasian creeds should in future be left out of the liturgy of the Church of Ireland.[43] His proposal which he published in a pamphlet in 1757 and his known anti-Trinitarianism so offended his fellow bishops that steps were taken to secure his prosecution for blasphemy. However, he died before the prosecution could be mounted.[44]

From this brief survey it seems clear that in the early eighteenth century both Convocation and Parliament regarded the mere expression of views critical of certain doctrines of Christianity, in particular of the Church of Ireland, to be blasphemous, even when put forward soberly and sincerely without any evidence of abuse or scurrility.

Case Law

Originally punishment of the expression of religious unorthodoxy fell within the sole jurisdiction of the ecclesiastical courts. In the first half of the fourteenth century there was a wave of heresy in Ireland which manifested itself in a twofold form, the denial of cardinal doctrines of the Catholic Church, and sorcery or witchcraft.[45] The most famous of these trials was that of Dame Alice Kyteler who was tried for heresy and witchcraft with sixteen others of her sect in 1324 in Kilkenny.[46] In 1327 Adam O'Toole was burnt

[40] See *A Representation of the Present State of Religion, with Regard to Infidelity, Heresy, Impiety and Popery: Drawn up and Agreed to by Both Houses of Convocation in Ireland, pursuant to Her Majesty's Command in Her Royal Licence* (Dublin, 1711).

[41] B. T. Duhigg, *History of the King's Inns* (Dublin, 1806), p. 356.

[42] *An Essay on Spirit, etc.* (London, 1751). This work contains a fine plea for the toleration of religious unorthodoxy.

[43] R. Mant, *op. cit.*, vol. 2, p. 616.

[44] *Ibid.* p. 617; W. D. Killen, *op. cit.*, vol. 2, p. 257. See also Sir John Macdonell, "Blasphemy and the Common Law," 33 *Fortnightly Review*, New Series (1883), pp. 776–789 at p. 782, note 1.

[45] St. J. D. Seymour, *Irish Witchcraft and Demonology* (Dublin, 1913), p. 50.

[46] See *A contemporary narrative of the proceedings against Dame Alice Kyteler, prosecuted for sorcery in 1324, by Richard de Ledrede, Bishop of Ossory* (ed. by Thomas Wright for the Camden Society, London, 1843); H. C. Lea, *A History of the Inquisition of the Middle Ages* (London, 1886; New York, 1906, 3 vols.), vol. 1, p. 354, and vol. 3, pp. 456–457; Montague Summers, *The Geography of Witchcraft* (London, 1927), pp. 85–91; W. Carrigan, *The History and Antiquities of the Diocese of Ossory* (4 vols., Dublin, 1905), vol. 1, pp. 49–55; J. T. Gilbert, *History of the Viceroys of Ireland* (Dublin and London, 1865), pp. 153–162.

Curiously enough, one difficulty met with by the prosecution in this case arose from a difference between the ecclesiastical law of England and Ireland; the canons against heresy were unknown in Ireland. See G. Parrinder, *Witchcraft* (Harmondsworth, Middlesex, 1958), pp. 85–86.

in Dublin for denying the incarnation of Christ, the Trinity of Persons and the authority of Rome.[47] In 1353 two men were burnt in County Clare for heresy.[48]

The writ *de haeretico comburendo* by which the common law came to the assistance of the ecclesiastical law with respect to the infliction of the death penalty was abolished in Ireland in 1696.[49]

During the course of the seventeenth century the common law courts in England came to exercise jurisdiction over blasphemous offences.[50] The outstanding landmark in this process is *R.* v. *Taylor* (1676).[51] The earliest case reported, of a blasphemy prosecution in the common law courts in Ireland, is the trial of Thomas Emlyn, a Unitarian Minister in Dublin, in 1703.[52] Emlyn had written a book, *A Humble Inquiry into the Scripture Account of Jesus Christ*, published in Dublin in 1702. This so outraged orthodox religious opinion, as well as members of the Dissenting community, that the authorities were obliged to prosecute Emlyn. He was charged upon indictment with writing and publishing a book, with seditious intent, wherein he had asserted that Jesus Christ was not equal to God the Father. He was found guilty on this charge, fined £1,000, together with a year's imprisonment. He was also obliged to find security for good behaviour for life.

The Chief Justice, Sir Richard Pyne, seems to have conducted the case in a manner aimed at securing Emlyn's conviction. He angrily informed the jury that if they acquitted, "My Lords the Bishops were there," suggesting that proceedings would be taken against Emlyn in the ecclesiastical courts if the common law courts failed in their duty.[53] When finally a verdict of guilty was returned and Emlyn had been sentenced, the Chief Justice informed him that he should be thankful he did not live in Spain or Portugal, where he would have been burnt for his blasphemy.[54]

Commenting on *Emlyn's* case, many years later, in a case concerned with the distribution of certain property among the Dublin

47 W. Alison Phillips, *History of the Church of Ireland* (3 vols., London, 1933–34), vol. 2, p. 103; R. Mant, *History of the Church of Ireland* (2 vols., London, 1850), vol. 1, p. 29.

48 Mant, *op. cit.*, vol. 1, p. 30; W. Alison Phillips, *op. cit.*, vol. 2, p. 103. See also D. F. Gleeson, "A Fourteenth-Century Clare Heresy Trial," *Irish Ecclesiastical Record* (Dublin), 5th series, vol. 99 (1958), pp. 36–42.

49 7 Will 3, c. 2 (Ir.). The equivalent English statute was 29 Car. 2, c. 9.

50 For an account of this process, see Nokes, *op. cit.*, pp. 21–64.

51 *Sub nom. Taylor's Case*, 1 Vent. 293; 86 E.R. 189; *sub nom. R.* v. *Taylor*, 3 Keb. 607 and 621; 84 E.R. 906 and 914.

52 See G. Matthews, *An Account of the Trial on 14th June 1703 before the Court of Queen's Bench Division of the Rev. Thomas Emlyn for A Publication against the Doctrine of the Trinity, with a sketch of his Associates, Predecessors and Successors* (Dublin, 1837); *The Works of Mr. Thomas Emlyn* (3 vols., 4th ed., London, 1746), vol. 1, pp. iii-cxli (*Memoir of the Life and Writings of Mr. Thomas Emlyn*).

53 *A True Narrative of the Proceedings of the Dissenting Ministers of Dublin against Mr. Thomas Emlyn; and of his Prosecution, etc., in the Secular Court* (London, 1719), p. 48.

54 Sir John Macdonell, *op. cit.*, p. 782.

Dissenting groups, Sir Edward Sugden, then Lord Chancellor of Ireland, said:

> " . . . I am not called upon to give any opinion whether that prosecution was right or wrong; but it proves this, which is of great importance, that as the law was then administered, it was blasphemy to deny the Divinity of Christ; and Mr. *Emlyn* was accordingly convicted of blasphemy in the Queen's Bench, on that ground, and suffered a long imprisonment, and a fine of considerable amount. I know this as a matter of fact in this cause. Mr. Emlyn had not spoken with irreverence of Christ; his was a candid inquiry and he could not be convicted on that ground; but his defence was inadmissible by law, and he was convicted." [55]

Following *Emlyn's* case there occur a number of incidents which might have thrown light on the view of blasphemy taken by Irish law but for the fact that there are no adequate reports of them. Thus in 1726 two men were tried and acquitted by the King's Bench on a charge of blaspheming, in that they were alleged to have drunk " a Health to the Devil and his Angels, and Confusion to Almighty God." They were acquitted owing to the bad character of the only witness for the prosecution, " she being as 'tis said, a Vile Woman." [56] In 1794 an undergraduate of Trinity College, Dublin, John Burk, was expelled by the Board for expressing heretical and blasphemous opinions to the effect that Christ was not the son of God, that the mode of creation described in Genesis was unreasonable, and that Hell did not answer his conception of a future state.[57] The views of Arthur Browne, Senior Fellow, Regius Professor of Laws in the University, and author of *A Compendious View of the Ecclesiastical Law of Ireland*,[58] on this case would be of some value if there were any record of them. A legal dispute about the will of William Thompson, an Irish Socialist and feminist, occupied many years in the second quarter of the nineteenth century. It was argued that a gift to republish Thompson's writings which expressed many unorthodox views on religion and other matters should not be upheld. The case, however, appears to have been decided on other grounds.[59]

[55] *Att.-Gen.* v. *Drummond* (1842) 1 Dr. and War. 353 at 384.

[56] See *The Whole Trial and Examination of Venisent FitzGerald; John Jackman who were Try'd this Present Tuesday being the 14th of this instant June 1726 for blasphemy, etc.* (broadsheet) (Dublin, 1726). This is to be found in Trinity College, Dublin, Library; it is No. 66 in a volume of Irish Pamphlets (press mark: Press A. 7. 4).

[57] R. B. McDowell, *Irish Public Opinion 1750–1800* (London, 1944), p. 175. See also *Trial of John Burk of Trinity College before the Board of Senior Fellows* (Dublin, 1794).

[58] 2nd ed., Dublin, 1803. It may be noted that in this work Browne states that the ecclesiastical law of Ireland with regard to blasphemy was the same as in England at the time (at p. 365).

[59] R. K. P. Pankhurst, *William Thompson (1775–1833)* (London, 1954), pp. 185–192.

In 1817 there occurred a case which, while not a prosecution for blasphemy, contains some dicta which are of relevance. The case was a prosecution initiated by Roger O'Connor, the father of Feargus O'Connor, the Chartist, and himself a man of strongly held unorthodox views in religion and politics. Having been acquitted of a charge of mail robbery O'Connor secured the prosecution for perjury of one Daniel Waring who had given evidence against him.[60] In the course of cross-examination O'Connor was questioned as to his religious beliefs. Asked whether he believed "in our Saviour," O'Connor turned to the court to inquire: "Am I subject to any pains or penalties if I say I do not?" The court assured him he was "not by our law."[61] Having given evidence that he believed in the Old Testament only as an historical record and in the New Testament only as relating to a *human* reformer, he was again assured by Mr. Justice Daly, probably the most liberally minded man on the Irish Bench at that time:

> "I have taken down your answer (*sic*), and I think it fair to tell you that it does not subject you to any penalties in these courts."[62]

In the course of his summing-up Mr. Justice Daly added:

> ". . . I trust I am not superstitious—Mr. *O'Connor* will probably think me so, when I say that a man who denies the authenticity of the Holy Scriptures, both old and new, who believes that the Saviour of this world who came to redeem mankind, and hold out the strongest motives and sanctions to moral duty, was a dupe or an impostor, does not only stand disparaged in his testimony, but should be considered as not sworn at all."[63]

The next trial in Ireland for blasphemy, of which there is some more adequate record, was that of *John Syngean Bridgman*, alias Brother John, in 1852.[64] It appears that Brother John, a Franciscan friar, had burnt a Protestant Bible, in an area where considerable efforts were being made to convert the local inhabitants to Protestantism. Considerable hostility existed between the friar and the Protestant missionaries, a number of whom gave evidence against him in court. Brother John stood indicted:

[60] R. W. Greene, *A Report of the Trial of Daniel Waring upon the Prosecution of Roger O'Connor, Esq., etc., for Perjury* (Dublin, 1817). See also R. R. Madden, *The United Irishmen, Their Lives and Times*, Second Series (2nd ed., London, 1858), pp. 606–607.

[61] R. W. Greene, *op. cit.*, p. 20.

[62] R. W. Greene, *op. cit.*, p. 21.

[63] *Op. cit.*, p. 58.

[64] This case is referred to as *R.* v. *Anon.*, by Nokes, *op. cit.*, p. 117 (r); it is also referred to in *R.* v. *Petcherine* (1855) 8 St.Tr.(N.S.) 1086 at 1087; 7 Cox C.C. 79 at 84.

A full account of the trial is to be found in Rev. P. M'Loskey, *The Trial and Conviction of a Franciscan Monk, at Mayo Spring Assizes, 1852, for burning and blaspheming the Holy Scriptures* (Dublin, 1852).

"that he not having the fear of God before his eyes, but intending to scandalise and vilify the true Protestant religion, as by law established within these realms, and to blaspheme the Holy Gospel of God and of Our Saviour Jesus Christ . . . unlawfully, wickedly, and blasphemously, in the presence of divers liege subjects of our Queen, set fire to and partly consumed by fire a copy of the Holy Gospel of God, being the authorised version thereof, appointed to be read in Churches, called the New Testament; and then and there holding in his hands said New Testament, wickedly and blasphemously, in the presence and hearing of divers liege subjects, then and there pronounced and spoke with a loud voice, and published of and concerning said New Testament, as aforesaid, these profane and most blasphemous words, that is to say, that it (meaning the New Testament) is not the Word of God, but the Word of the Devil, and the Devil's Book—Luther's Bible, or your Heretic Bible—to the great dishonour of Almighty God, and in contempt of the Protestant religion, and to the great scandal of the profession thereof, and against peace, etc." [65]

In charging the jury Baron Lefroy said:

". . . you are to try whether the traverser is at liberty to indulge his uncharitable feelings under the plea of the conduct of others [there had been a suggestion that his action had been provoked by the activities of the Protestant missionaries], and, by his conduct insult Christianity itself. . . . It is for you to say whether these charges have been proved or not, and whether you are satisfied that he said he was not burning the Word of God, but the Word of the Devil, and whether the words were applied to the authorised version of the Scriptures; because whether it be the Douay Bible or the Rhenish Testament; and the words used would be blasphemous against either version, as showing a want of reverence for the Scriptures; because it is not the version of the Scriptures which will warrant the commission of such an offence. It is not because fallible man cannot agree upon the translation of a portion of the Scriptures, that they are to be treated with this want of reverence; that because it is not a particular translation, it shall be treated with such vilification. Is it to be held that, when the law of the land sanctions a certain version, and calls it the authorised version, it is to be said that any man, be his opinions what they may, shall pour contempt upon it, and thus be guilty of a violation of the law? Is he to be at liberty to throw that book into the fire, and say that he vilify that book which the law has sanctioned? It has been said to you that this act must be done with *intent*, and on that the law is clear; every man is presumed to understand the consequences of his own acts. If a man can throw a book into the fire, whether it be the Douay Bible or the authorised version, and if you believe that he did not intend any contempt, then you should acquit him: But if you believe that he did burn the

[65] Rev. P. M'Loskey, *op. cit.*, p. 13.

book, and made use of the language it will be your duty to find him guilty." [66]

Brother John was found guilty. The sentence was that he should be bound over to keep the peace and be of good behaviour for seven years.[67]

In 1855 occurred another case involving Bible burning. The Reverend Vladimir Petcherine, Redemptorist Father, delivered a series of sermons in Kingstown, aimed at discouraging people from reading "evil" literature.[68] He invited his listeners to collect together such literatures of this kind as they possessed, and to bring them to him for burning on a bonfire in the chapel yard. Defending Petcherine, Thomas O'Hagan, Q.C., said:

> "And the people obeyed his call, and multitudes of books were brought to him—pamphlets in bundles—infamous periodicals which are the daily food of the popular mind in England—translations of sensual novels from the French, and vile English novels, whose very names are an abomination." [69]

Unknown to Father Petcherine, among the bundles of books brought for burning there was a copy of the Bible. Upon his being charged upon indictment with blasphemously burning the Bible, the jury had little difficulty in finding that Petcherine was not guilty. In his direction to the jury Baron Green expressly approved the remarks of Lefroy quoted above, to the effect that the particular version of the Bible that was burned was immaterial; what was material was whether the defendant intended to burn the Bible, and said:

> "It has been truly stated to you that the Christian religion is part and parcel of the law of this land. Any publication or conduct tending to bring Christianity or the Christian religion into disrespect, or to expose it to hatred or contempt, is not only committing an offence against the Majesty of God, but is in violation of the common law of the land. Among the ways in which that offence may be committed is by exposing the Word of God, or any part of it, to obloquy or hatred. The highest authorities have laid down the law in that way, both ancient and modern. It is now for you, with these observations, to consider, first whether you are satisfied in the way that I have described to you that any copy of the Holy Scriptures, or any Bible of the authorised version, was in point of fact

[66] Rev. P. M'Loskey, *op. cit.*, pp. 26–27.

[67] *Ibid.* p. 27.

[68] *R.* v. *Petcherine* (1855) 7 Cox C.C. 79. See also J. Boyle, *A Special Report of the Trial of the Rev. Vladimir Petcherine (one of the Redemptorist Fathers) in the Court House, Green St., Dublin, December 1855, on an indictment charging him with burning the Protestant Bible at Kingstown* (Dublin, 1856).

[69] *Selected Speeches and Arguments of the Rt. Hon. Thomas, Baron O'Hagan* (ed. G. Teeling, London, 1885), p. 261. The whole speech for the defence is given at pp. 243–284.

> burned. Next, whether you have any reasonable doubt that the traverser knew it and sanctioned it." [70]

Commenting in an anonymous article on this case, Cardinal Wiseman criticised it on two main grounds. First, that it was not desirable that all versions of the Bible should be regarded as being equally deserving of the protection of the law. Secondly, that it was ridiculous for a blasphemy prosecution to have been brought against Father Petcherine, when prosecutions might more suitably have been initiated by the Crown against secularist propaganda in England.[71]

Professor Kenny refers to another Irish case, decided in 1909, which held that to appear in public dressed as Christ constitutes the offence of blasphemy.[72] However, it has not been possible to find a report of any such trial. Perhaps Professor Kenny had in mind a hearing before the Recorder of Dublin when the manager of a skating rink applied for a dancing and music licence. Counsel appearing for the applicant referred to an incident which had become a matter of public notoriety. A week before a man had appeared at a public carnival at the skating rink, dressed in a manner which was calculated to suggest that he was Christ. The manager ordered him to remove the letters "I.H.S." from his back. When this was done the costume was quite inoffensive. The Recorder in granting the licence said:

> ". . . that as the man might be made responsible for his conduct on another occasion, he refrained saying what he thought of it. A graver or more terrible outrage it was almost impossible to conceive." [73]

From these few Irish cases it would appear that at the beginning of this century the offence of blasphemy might be committed rather because of the matter than the manner of what was said or done.[74] The outstanding problem is whether the judgment of the House of Lords in *Bowman* v. *Secular Society* [75] had the effect of altering the Irish law of blasphemy. Their lordships were unanimous in accepting Lord Coleridge C.J.'s dictum in *R.* v. *Ramsay and Foote* [76] that, if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the author of such attacks being guilty of blasphemy. It would be possible in Irish law today to avoid giving full effect to this decision only on

[70] 7 Cox C.C. 79 at 84.
[71] "Bible-Blasphemy," 40 *Dublin Review* (1856), pp. 200–252.
[72] Kenny, *op. cit.*, p. 140.
[73] *The Times* (London), October 28, 1909, p. 10, col. 4.
[74] The only authority to the contrary is to be found in the *obiter dicta* in *O'Connor* v. *Waring* (1817), *ante*.
[75] [1917] A.C. 406. See also "Bequest to a Secular Society," 51 *Irish Law Times and Solicitors' Journal* (1917), pp. 245–246.
[76] (1883) 15 Cox C.C. 231 at 238. Being a decision of the English Q.B.D. this case could only be of persuasive authority in Ireland.

one of two grounds. (a) That in *Bowman* v. *Secular Society* the House of Lords were sitting as an appeal court in an English case applying English law, and that decisions of the House of Lords before 1922 are binding on Irish courts only if the decision given by the House was on appeal from Ireland, and hence applying Irish law.[77] In fact the Supreme Court in Ireland has never shown the slightest evidence of any tendency to adopt such a restrictive approach.[78] (b) That the Constitution, as it now stands, of the Irish Republic has had the effect of altering the pre-existing law, including its modification in the light of *Bowman's* case. This is quite a tenable argument in the light of the particular provisions of the Constitution which have been quoted earlier on.

Bowman's case is also authority for the principle that public policy does not require the courts to refuse to assist the subversion of Christianity by upholding the gift to a secular society as valid. Irish public policy today is grounded in the Constitution. It seems, therefore, that as regards gifts to secular societies and bodies conducting anti-religious or irreligious activities, it is possible that Irish courts would refuse to enforce them on the grounds of public policy, in particular art. 44. 1 of the Constitution. What other legal effect may this article have? It would seem capable of rendering unenforceable, or perhaps simply non-charitable, gifts for the purposes of religions other than those specifically named or which existed in Ireland on December 29, 1937. Its effect might be even more drastic, as, for instance, to deny to parents who belong to a non-recognised religion the right to educate their children in that particular religion.[79] It perhaps should be pointed out that this is not an unreal problem, *e.g.*, there are now in Ireland refugees from Asia, whose religions can hardly be said to have existed in Ireland in 1937.

To return to the effect of the provisions of the Constitution on criminal responsibility for blasphemous offences, there is no case law here to guide us to the answer. One may look for suggestions from the text-writers. With one exception they are all silent on this problem. The exception is Mr. O Siochain's *Criminal Law of Ireland*.[80] The chapter on "Offences against Religion" is not very helpful. At the outset blasphemy is defined in such a way that it is uncertain whether the element of scurrility or a tendency to provoke a breach of the peace is necessary.[81] Then Mr. O Siochain

[77] This possibility is discussed, and dismissed, by Professor J. L. Montrose, "Ratio Decidendi and the House of Lords" (1957) 20 M.L.R., pp. 124–130 at 126–127.

[78] *Cf. Boylan* v. *Dublin Corporation* [1949] I.R. 60 at 65 and 77; and *Minister of Finance and Att.-Gen.* v. *O'Brien* [1949] I.R. 91 at 116 and 150.

[79] *Cf. Constitution of Ireland*, art. 42.

[80] 3rd ed., Dublin, 1952, Chap. XXI.

[81] *Ibid.* p. 215: "To speak or write offensively about God or religion, as to deny the existence of God, or to bring God or religion into contempt, ridicule or disbelief is blasphemy." Does this mean that the speech or conduct must not

cites Canon 2323 of the Roman Catholic Church for a definition of blasphemy.[82] This latter definition clearly does not necessarily involve a tendency to provoke a breach of the peace. What is the significance of this citation? It surely can have no legal relevance unless Mr. O Siochain believes that the Constitution has altered the legal meaning of blasphemy. This in fact may be the case for he later says that blasphemy, in virtue of articles 41. I. 1 and 40. 6. I. 1 of the Constitution, "now also is an offence against the Constitution."[83] Finally Mr. O Siochain states:

> "The propagation of anti-Christian doctrines, apart from scurrility or profanity, does not constitute the offence of blasphemy and is not criminal."[84]

This definition is circular and not of much value if, as has been suggested already, *profanity* is synonymous with *blasphemy*.[85]

Conclusion

The conclusion is then forced upon us that there is considerable doubt as to the meaning of the term "*blasphemous*" as used in the Irish Constitution and in modern Irish legislation. The Constitution is open to a retrogressive interpretation which would discard the progress which has been made in the legal toleration of sincere religious dissent and rational disbelief; the high-water mark of which is to be seen in *Bowman's* case. Not only may the Constitution be interpreted in a way unfavourable to the non-believer, but even to members of religions other than those which are recognised by the Constitution. Such uncertainty is undesirable. In such circumstances one may be tempted to echo Walter Bagehot's tart remark:

> "No one knows what blasphemy is or sedition is, but all know that they are vague words which can be fitted to any meaning that shall please the ruling powers."

Common lawyers may pride themselves on the extent to which a degree of certainty has been introduced into the definition of blasphemy. It seems regrettable, therefore, that the Constitution of the Irish Republic should have thrown the matter once more into confusion and obscurity.

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merely, for example, deny the existence of God, but must also contain a further element of offensiveness, or does mere denial amount to the offensiveness required for the crime of blasphemy?

[82] "According to the Canon Law, blasphemy is spoken or written words of insult to God or His Saints or sacred things": *ibid.*

[83] *Ibid.*

[84] *Ibid.* p. 216.

[85] See *ante*, note 3. The particular phrase used by Mr. O Siochain here comes from the headnote to *Bowman* v. *Secular Society* [1917] A.C. 406. However, the judgments in that case do not anywhere employ this particular definition. It should perhaps be added that Mr. O Siochain also cites *Bowman's* case as authority for a principle of law which was in fact rejected by the majority judgments.

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INTERNATIONAL LAW AND HUMAN RIGHTS

The main problem which confronts international lawyers today is the problem of the effectiveness of international law.[1] There would seem to be two essential conditions which must be satisfied before any law can be effective. First, there must be a fundamentally similar sense of values amongst at least a majority of the persons to whom the law is to apply. If this is absent the law has no real strength.[2] Secondly, there must be a legal system. Although there can be no adequate definition of a legal system, except in a relative sense, it is probable that there must be machinery to lay down the provisions of the law (*e.g.*, a legislature), to decide on the meaning of the law and its application to particular cases (*e.g.*, the courts), and to enforce the decisions of those who apply the law (*e.g.*, the police).[3] The whole problem appears particularly clearly in the matter of human rights.

The first attempt to bring "human rights" as a whole within the scope of international law was made in the United Nations Charter. Thus article 1 (3) provides that the organisation and its members shall seek "to achieve international co-operation . . . in promoting and encouraging respect for human rights . . . without distinction as to race, sex, language or religion." It is probable however that this article provides no legal obligation to respect human rights,[4] and even if it did the extent of the obligation would be disputable since it is nowhere defined in the Charter.[5] The Economic and Social Council, however, being charged with the task of promoting human rights,[6] has set up a Commission under authority in the Charter [7] for the purpose of preparing an International Bill of Human Rights with effective machinery for its enforcement. The initial result of the Commission's work was the adoption in 1948 by the General Assembly,[8] of the Universal Declaration of Human Rights.[9]

1 Schwarzenberger, *The Impact of the East-West Rift on International Law*, vol. 36, Transactions of the Grotius Society. 1950.
2 Brierly, *The Law of Nations* (5th ed.), p. 111.
3 *Ibid.* p. 73. "Among the most serious shortcomings of the present system are the rudimentary character of the institutions which exist for the making and the application of the law . . . ."
4 Goodrich & Hambro, *The Charter of the United Nations—Commentary and Documents*, p. 97; Oppenheim, *International Law* (ed. Lauterpacht), 8th ed., vol. I, p. 739.
5 *Ibid.*, and Oppenheim, *op. cit.*, p. 740.
6 Art. 62 (2), and see art. 55 (c).
7 Art. 78.
8 The Declaration as a whole was adopted by 48 votes with 8 abstentions.
9 General Assembly Resolution 217 (III), December 10, 1948. Treaty Series, "United Nations No. 2 (1949)." Cmd. 7662.

The Declaration suffers from three defects. It does not impose any binding obligation in respect of the rights with which it deals,[10] but even if it did, there is no provision for any machinery of enforcement, other than the United Nations itself. Furthermore, its provisions are insufficiently precise to enable states to determine the exact scope of their obligations. Thus Article 3 provides that "Everyone has the right to life, liberty and security of person," but no article specifies any circumstances in which a person might properly be deprived of his life or liberty.[11] Article 10 also provides for "a fair and public hearing by an independent and impartial tribunal, in the determination of (a person's) rights and obligations and of any criminal charge against him." Here again the article does not set out any circumstances in which a hearing need not be in public, nor does it provide any criteria, procedural or otherwise, for determining whether or not a hearing is "fair."[12]

The reason for this imprecision is not far to seek. It lies in the differing attitudes of states to the values therein expressed and it was this vagueness itself which alone made possible the wide acceptance of the Declaration.[13] Thus the racial policy of the Union of South Africa, the attitude of Moslems to women, and of Communists to individuals, are found acceptable to some but not to others. The result is that until these differences are ameliorated, it will remain impossible to import precision, and therefore effectiveness, into this branch of international law. The lessening of these differences depends upon a favourable political and moral climate rather than on legal action except in so far as the latter may help to create such a climate.

There is, however, one important way in which international law may be made more effective. It is by seeking out those areas in which agreement, on such matters as human rights, can be most easily reached, owing to basic similarities of thought and action.[14] One such area appears to be Western Europe [15] where, in 1950, fifteen countries [16] signed a Convention for the Protection of Human

[10] Oppenheim, *op. cit.*, p. 745. The Preamble states that "This Universal Declaration of Human Rights . . . (is) . . . a common standard of achievement . . . to the end that . . . every organ of society . . . shall strive . . . to promote respect for these rights and freedoms. . . ."

[11] *Cf.* art. 5, European Convention on Human Rights (*infra*) which qualifies the right to liberty by provisions as to "lawful arrest or detention."

[12] *Cf.* art. 6 (i), European Convention, as to the exclusion of the public "in the interests of morals, public order or national security, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

[13] Oppenheim, *op. cit.*, p. 743.

[14] Oppenheim, *op. cit.*, p. 744.

[15] Preamble to European Convention, 1950.

[16] *Viz.*: Belgium, Denmark, France, German Federal Republic, Greece, Iceland, Irish Republic, Italy, Luxembourg, Netherlands, Norway, Saar (although a signatory to the Convention, its general position is anomalous), Sweden, Turkey, United Kingdom.

Rights and Fundamental Freedoms,[17] designed to give effect to the Universal Declaration of 1948.[18] Although narrower than its predecessor in that certain rights, for example, the right to nationality,[19] to freedom of movement within and in leaving and returning to one's country,[20] to participate in government,[21] to social security,[22] the right to work,[23] and the right to an adequate standard of living,[24] are omitted, the rights which are protected are carefully defined as are the circumstances in which derogation from their strict observance is permitted.

Thus article 11 (2) repeats, in respect of the right of freedom of association and assembly, the limitations to be observed in restricting any of the rights guaranteed by the Convention. It provides that "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security, or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others." Other restrictions are allowed "in time of war or other public emergency threatening the life of the nation . . ."[25] and article 17 contains the important provision that neither persons nor states have any right to aim at the destruction or limitation of these rights except as the Convention permits.

These provisions represent a considerable advance on those of the Universal Declaration, but the most important advance in the European Convention is that it contains adequate provisions for its own enforcement. Thus it provides for supervision of its obligations by a Commission[26] (established in 1954),[27] for the independent determination of breaches by a special court[28] (established on January 21, 1959),[29] or by the Committee of Ministers of the Council of Europe, and for enforcement of the Convention either by the court or by the Committee. The function of the court and of the Commission is, in the words of the Convention, "to ensure the observance of the obligations undertaken by the High Contracting Parties."[30]

The Commission, consisting of persons elected by the Committee of Ministers,[31] has jurisdiction in two cases. By article 24, it may

17 Treaty Series No. 71 (1953) Cmd. 8969.
18 *Supra*, note 9.
19 Art. 15.
20 Art. 13.
21 Art. 21.
22 Art. 22.
23 Art. 23.
24 Art. 25.
25 Art. 15.
26 Arts. 20–37.
27 The Convention came into force on September 3, 1953, on ratification by ten signatories: Art. 66 (2).
28 Arts. 38–56.
29 After acceptance of its jurisdiction as compulsory by eight states.
30 Art. 19.
31 Art. 21.

receive complaints, from parties, of alleged breaches of the Convention, and by article 25, it may receive similar complaints from "any person, non-governmental organisation or group of individuals," provided that the complaint is made against a party which accepts the right of individual petition. Many matters have already been referred to the Commission under both heads; for example, the Greek Government has alleged breaches of the Convention in Cyprus by the British Government, and, when the Communist Party in West Germany was outlawed there, it unsuccessfully petitioned the Commission on the ground that its outlawry was a breach of the right of freedom of expression guaranteed by the Convention.[32]

The Commission receives petitions through the Secretary-General of the Council of Europe[33] and passes them on to a sub-commission,[34] which considers their admissibility, and invites comments thereon from the government or governments concerned. The full Commission then decides on whether the petition is admissible or not. If it admits the petition, then by article 28 it may investigate the facts alleged in the petition, and must thereafter seek to bring the parties to a friendly settlement. Whether a settlement is reached or not, the matter is reported on to the Committee of Ministers.[35]

The Committee of Ministers decides, within three months, whether or not there has been a breach of the Convention, unless the matter has been referred to the court by one of the parties or by the Commission.[36] If the Committee finds that there has been a breach, it decides on what measures shall be taken and lays down the time within which the party at fault must comply with its decision. All parties are bound to carry out the Committee's decisions, but if nothing is done, the Committee decides on further measures and publishes a full report.[37] The measures which the Committee may prescribe are not enumerated in the Convention, but would seem to include ordering the party at fault to pay compensation, to restore confiscated property, or to alter its legislation. This last power might prove of considerable importance provided that other measures, such as an economic embargo, were available to back it up. One further point is that the Council of Europe is enabled to keep a watchful eye on the position in any state which is a party to the Convention, since by article 57 the Secretary-General of the Council may request from any such state "an explanation of the manner in which its internal law ensures the

[32] The European Commission of Human Rights—Procedure and Jurisprudence: McNulty and Eissen (1958) *Journal of the International Commission of Jurists*. Vol. 1, No. 2, p. 198.
[33] Art. 25.
[34] Art. 29.
[35] Arts. 30 and 31.
[36] Art. 32.
[37] *Ibid.*

effective implementation of any of the provisions of the Convention." This prevents a state from pleading that its internal legislation is of purely domestic concern.

The court, too, has considerable powers when seised of a matter,[38] but restrictions limit the number of cases which it can consider.[39] First, it can only deal with a matter brought before it by a state or by the Commission. Thus individuals cannot go direct to the court. Secondly, no state is bound to accept the court's jurisdiction,[40] and although eight states have done so, some (including the United Kingdom) have not done so, thereby weakening the court's position. And thirdly, the court can only deal with cases which are brought before it within three months of the Commission's report to the Committee of Ministers.[41] This, however, is not fatal as the Committee then acts as an alternative to the court.

If the court has jurisdiction at all it should prove an effective instrument, for the parties to a case before it are bound to accept its judgment as final and binding (articles 52 and 53), and, since jurisdiction is optional, a state will not go to the court unless prepared to accept its judgment, nor presumably will the Commission refer to the court a matter in which the defendant state is likely to disregard the court's decision. The court also has power to afford just satisfaction to an injured party even though such reparation is not allowed by the law of the state at fault.[42] It is difficult to see how effect is to be given to this in the courts of a particular country. The answer must be that, in such a case, either the state will have to change its law as to sovereign immunity to allow recovery from another state through the usual machinery of the courts, or, as is perhaps more likely, the matter would be settled between governments, and, where necessary, the Commission. Here again there might have to be some change in the law to enable an individual to recover from his government any moneys received by it on his behalf, for traditional international law provides that a state is not accountable to its nationals, injured by another state, for compensation paid by the responsible state, the injury being considered to be an injury to the state and not to its national.

How can we sum up this development? There are perhaps three main points. The first is that an agreement of this sort can only be effective as between states whose principles are essentially the same both in content and in expression. It was therefore necessary to find a group of states as homogeneous as those in Western Europe. In due course similar treaties may be adopted by other states whose principles coincide, and at a later date one must hope that these various group treaties will turn into the

[38] Art. 50.
[39] Art. 48.
[40] Art. 46.
[41] Art. 47.
[42] Art. 50.

international convention originally envisaged by the Charter. The second point is that there is probably sufficient coercive machinery, both of a moral and of a more practical kind, to ensure observance of the obligations of the Convention. At the moment this is so only because the obligations are limited to a small number of exceedingly interdependent states. It is this interdependence which is the crucial factor, for it gives the majority within the group sufficient power—largely of an economic and political kind—to enforce the Convention in the face of breaches by a minority. The third point is that individuals are given some guarantee of protection against the possible tyrannical interference of their own governments. The non-acceptance by several states of the right of individual recourse to the Commission, and the complete failure to allow individuals to be parties before the court, inevitably weakens this protection. There is no likelihood of allowing individuals to go direct to the court in the near future, but more individuals may allow individual recourse to the Commission when they are rid of the fear of political embarrassment through the possible extension of this right to overseas dependent territories.

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STATUTES

The Street Offences Act, 1959

One of the first things which American and other overseas visitors to Britain interested in social problems have usually remarked upon, when visiting London, has been the open solicitation of men by women prostitutes in the London streets. If the Street Offences Act, 1959, continues to have the success which it seems to enjoy at present, this topic will no longer appear as routine in our conversations with these visitors, and we shall all be relieved. For there can be no doubt that the visible and obvious presence of large numbers of prostitutes in the streets in some parts of London and of a few large provincial towns has been a source of grave embarrassment in the last few years, and it was the rising public concern over this which forced the Government when setting up the Wolfenden Committee to include in its terms of reference the subject of offences against the criminal law in connection with prostitution and soliciting for immoral purposes.[1] The intention of the present Act is to place on the Statute Book most of the Committee's recommendations in this connection, with the declared object of " cleaning the streets " of the more obvious manifestations of this trade in vice.

The statistical picture

Whether in fact there had been an increase in the actual number of prostitutes the Wolfenden Committee was unable to discover. The mere fact that there had been a sharp rise in the number of prosecutions and convictions suggests this, but it by no means proves it. The rise may only reflect an increase in police activity in this direction.[2] Nevertheless, the figures for the number of prosecutions and convictions are quite startling, as the following extract will show:

Extract from Table XII of the Wolfenden Report.[3]

Street Offences (England and Wales)

Year	*No. of prosecutions*	*No. of convictions*
1938	3,280	3,192
1946	4,423	4,393
1952	10,319	10,291
1955	11,916	11,878

[1] See Report of the Committee on Homosexual Offences and Prostitution, Cmnd. 247, September 1957, paras. 229–232, pp. 81–82.
[2] *Ibid.* para. 231, p. 81.
[3] *Ibid.* p. 143.

The Committee's Report, which appeared in September 1957, only gives the figures to the end of 1955, but we are now in a position to complete the picture as follows[4]:

Year	*No. of prosecutions*	*No. of convictions*
1956	11,947	11,855
1957	15,583	15,486
1958	19,663	19,536

Whether these increases do in fact represent a real increase in the amount of prostitution or simply reflect increased police activity cannot be determined, but even if the latter be true, this may well be in turn a reflection of the growing public concern about this problem. Indeed, the very existence of this Committee, and the publication of its Report, may well have had some influence upon the figures for the last few years. There is some evidence to suggest that in the past the number of prosecutions has been drastically affected by adverse criticism of the police. The Report cites the figures for the number of prosecutions for street offences by prostitutes in the Metropolitan Police District for the years 1922 and 1923. The respective figures are 2,231 and 595, and the severe drop was attributed to severe criticism of the conduct of the police in connection with a prosecution.[5] It may be equally true that the number of prosecutions has increased because the police have realised that they had public support in this matter at the present time.[6]

It seems quite likely that there has been a change in the areas where prostitution is prevalent, which has forced the problem upon the attention of local residents and business people in those areas where the activities are now prevalent, and given them ground for complaint.[7] This certainly seems to be true of London, and it may also be true in rural areas where the presence of military establishments has created new problems.[8]

The Wolfenden Committee's recommendations

Like its predecessor, the Street Offences Committee of 1928,[9] the Wolfenden Committee found two main defects in the way in which the law defined solicitation for immoral purposes. The first was the requirement to prove annoyance of the party solicited, which arose in England and Wales every time the case was contested, but was not part of the law of Scotland. The second was the use of the term "common prostitute" as part of the definition of the offence. On the subject of each of these defects there was a long

[4] See the annual Home Office *Criminal Statistics* for these years, Tables D and II.
[5] *Loc. cit.*, *supra*, para. 231, p. 81.
[6] *Ibid.*
[7] *Ibid.* para. 232, p. 82.
[8] *Ibid.* para. 266, p. 90.
[9] Cmd. 3231, November 1928.

history of controversy. Further defects were the lack of any single law of universal application in England and Wales (a great deal of the task of regulating the activities of prostitutes fell to local by-laws), and the lack of adequate penalties, so that the prostitute plied her trade without much fear of the criminal law.

(i) *The requirement of annoyance.* The Street Offences Committee of 1928 had found this requirement objectionable since it required the evidence of a police officer to be available to testify to the state of mind of the person or persons accosted, who were rarely available themselves to give evidence. That Committee suggested that the requirement should be eliminated and the law reframed along different lines.[10] The Wolfenden Committee re-examined the whole matter, and likewise concluded that the requirement was unsatisfactory, and should be eliminated.[11] This has now been done, for the requirement does not appear in the new version of the offence of solicitation for immoral purposes, enacted by section 1 (1) of the Street Offences Act, 1959.[12] The Act substitutes a simple uniform law for the multifarious legislation hitherto in force on this subject, much of which is repealed.[13]

(ii) *The phrase "common prostitute."* There were strong arguments against perpetuating the description "common prostitute" in the offence of solicitation, on the ground that it discriminates against this unfortunate class of women, by introducing a most unfair element into the trial prior to the finding of guilt, namely, the fact that the offender is known to have done this before. Moreover, it was argued that the reformation of prostitutes is hindered by having this outcast label attached to them. The Wolfenden Committee did not accept these contentions. It said that no evidence had been received showing that prostitutes felt a sense of grievance or feared injustice on this score, nor any evidence that this had interfered with their reformation.[14] The Committee was greatly impressed by the need to safeguard the reputations of innocent women, who might be arrested and charged with offences of solicitation if there were no such requirement that the person accused should be a known prostitute. It tried to devise an alternative formula based on the notion of habitual or persistent conduct, but was not satisfied with the result, and therefore concluded on balance that the phrase "common prostitute" should remain.[15]

[10] The Committee proposed a new offence aimed at every person who in any street or public place importunes any person of the opposite sex for immoral purposes: para. 37, p. 17.
[11] *Loc. cit.* para. 256, p. 87.
[12] s. 1 (1) reads: "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."
[13] See s. 5 (2) and the Sched.
[14] Para. 259, p. 88.
[15] Paras. 260–262, pp. 88–89.

This negative conclusion was severely attacked and criticised by various bodies and persons, including the Church of England Moral Welfare Council,[16] and was strongly opposed in the parliamentary debates on the Bill. But the new Act retains the phrase as part of the definition of the offence, and at first the present writer was disposed to accept the wisdom of this retention.[17] But in view of the fact that a comprehensive system of cautions is being introduced which obliges the police to give at least two informal warnings before prosecuting for soliciting,[18] it now seems that the case for retaining the phrase in the interest of the innocent woman has worn pretty thin, if not entirely disappeared. Moreover, the interests of the innocent woman are further protected by section 2 of the new Act, which provides that a woman who claims that she has been wrongly cautioned can apply to the magistrates' court within fourteen days to have the record or entry of the caution, which is kept at the police station, expunged. These proceedings will be conducted *in camera* unless the woman desires a public hearing. At an appropriate moment the pressure groups should renew their efforts to remove this undesirable designation " common prostitute " from our law.

(iii) *Heavier penalties for prostitution.* The Wolfenden Committee recommended the introduction of heavier penalties,[19] and the new law follows closely the Committee's recommendations. Formerly, in London the maximum fine was normally forty shillings, and imprisonment was not available. In the provinces, a similar limitation existed on the maximum fine, but imprisonment could be ordered for not more than fourteen days. Now, by virtue of section 1 (2) of the new Act, a person guilty of an offence under section 1 will be liable, on a first conviction, to a fine not exceeding ten pounds, on a second conviction, to a fine not exceeding twenty-five pounds, and for a third or subsequent conviction, to a fine not exceeding twenty-five pounds or imprisonment for a period not exceeding three months, or both.

The purpose of these heavier penalties, as conceived by the Wolfenden Committee, was twofold: first, it was hoped to deter some persons and cause them to give up prostitution or never take to it in the first instance; secondly, it was hoped that it would encourage both courts and offenders to make more use of probation.

[16] See the pamphlet entitled *The Street Offences Bill—A case for its amendment*, 1959, published for The Church of England Moral Welfare Council by The Church Information Board.

[17] See article entitled " The Wolfenden Report—An Appraisal," *Political Quarterly*, Vol. 29, pp. 132 *et seq.* (April–June 1958).

[18] The Lord Chancellor described the system which the Commissioner of Police for the Metropolis is to adopt for giving two cautions before making an arrest, in the Second Reading debate on the Bill, H.L.Parl.Deb. (5th ser.), Vol. 216, col. 72 *et seq.* (May 5, 1959). The Home Secretary has commended the provincial police to follow the same procedure.

[19] Para. 275, p. 92.

Since this requires the consent of the probationer, if over fourteen years old, and the alternatives in the past were simply small fines, few prostitutes were willing to accept probation even if it was offered to them. The Committee was particularly anxious to encourage the young prostitute to accept probation.[20] So far, it appears that little use is being made of probation. Mrs. Rosalind Wilkinson, writing in *The Sunday Times*,[21] reported that in London in the first seven weeks of the Act's operation, only one person was placed on probation out of 264 persons convicted. The large majority received fines of up to £5. It had been expected that there would be many more pleas of "not guilty," but in fact these amount to only about 10 per cent.

Many social workers and criminologists have wondered whether it was wise to introduce short terms of imprisonment as penalties under the new law. No special form of detention is provided for prostitutes sentenced to imprisonment: they go to the local gaols where they mix with the other prisoners, and a certain amount of contamination undoubtedly occurs. The Wolfenden Committee considered the question whether any special arrangements were desirable, and concluded against, and they were probably right.[22] However, the success of the deterrent policy embodied in the new law will be measured largely by the number of persons sent to prison. The degree to which imprisonment can be avoided will be a barometer of the Act's success. So far, the position is that in the first two months of the Act's operation thirty-three women were sent to prison for offences under the Act. In addition, fifty-three women served terms of imprisonment in default of payment of a fine.[23] From these figures, it would appear that only a very small percentage of those persons convicted have been sent to prison. This figure should be compared with the total number of women imprisoned in the year 1958 for the offences of prostitution, which was 138.[24] Clearly we shall have substantially more than that in a twelve-month period, but how much more remains to be seen.

The Wolfenden Committee also recommended that more use should be made of the power to remand offenders for a social or medical report prior to sentence. This would be especially valuable in the case of first or second offenders, and although the courts already have power to remand up to three weeks for such purposes, under the Magistrates' Courts Act, 1952, it was recommended that

[20] Paras. 277–278, p. 93.

[21] *The Sunday Times*, December 6, 13, 20, 1959.

[22] Paras. 282–283, pp. 94–95.

[23] Mr. Vosper gave these figures in the House of Commons in reply to a question asked by Mr. Finch, November 5, 1959: H.C.Parl.Deb. (5th ser.), Vol. 612, col. 1195.

[24] *The Criminal Statistics*, 1958. Cmnd. 803, Table VII, pp. 48–49.

an express power be enacted for the case of prostitutes.[25] No such special provision appears in the Street Offences Act, 1959.

(iv) *The penalty for living on immoral earnings.* One direction in which the Street Offences Act does go further than the Committee was prepared to go is in raising the penalty for living on immoral earnings. Previously the maximum penalty was two years' imprisonment, and the majority of the members of the Committee felt that this was adequate.[26] However, the women members wanted to increase this to five years' imprisonment.[27] The Act raises it to seven years' maximum, which seems an unnecessary gesture: the maximum is extremely unlikely to be imposed, but of course it is primarily intended to deter.

(v) *All-night cafés.* The Committee discussed very briefly the law and practice relating to the control of refreshment houses which stay open all night, and which are frequently the meeting-place of prostitutes and undesirable persons, but made no recommendation.[28] By virtue of section 3 of the Act, these all-night cafés are to be subjected to more rigorous penalties for infringement of the licensing regulations. The maximum penalties for these offences are to be increased from £5 to £20 for a first offence, and from £20 to £50 for subsequent offences.

(vi) *Scotland and Northern Ireland; Commencement.* The Street Offences Act, 1959, does not apply to Scotland or Northern Ireland. It came into effect on August 16, 1959.

(vii) "*Street or public place*"; *the police officer's power of arrest.* Under section 1 (3) of the Act, a constable is given power to arrest without warrant anyone he finds in a street or public place and suspects, with reasonable cause, of committing an offence under this section. He previously had a right of arrest where the offence was committed "in his view." For this purpose, the expression "street" is given an extended meaning by virtue of subsection (4) to include any bridge, lane or passage open to the public, whether a thoroughfare or not, and also the entrances of premises abutting on the street, and doorways, and any ground adjoining the street and open to it. Apparently no extended definition of "public place" was required, and recently a magistrates' court in London held that a woman who was leaning out of an upstairs window to attract the attention of male passers-by was soliciting in a public place, although she was quite obviously not in the street, even on the extended view sanctioned by subsection (4).

[25] Paras. 279–280, pp. 93–94.
[26] Para. 307, p. 101.
[27] Reservation V, p. 128, by Mrs. Cohen, Mrs. Lovibond and Lady Stopford.
[28] Para. 349, p. 113.

The effects of the new law

It is still rather soon to estimate the effects of this change in the law relating to prostitution. It was feared that certain undesirable consequences would flow from the attempt to clear the streets, such as the emergence of new classes of middlemen in the ranks of taxi-drivers and hotel porters, who could supply the names and addresses of prostitutes. Also it was feared that the "call-girl" system would become more prevalent. The small shops would receive many more bogus advertisements for display in their windows, offering the services of girls as "models," "masseuses" and the like. The Wolfenden Committee frankly recognised these dangers,[29] and Mr. James Adair, the brave Scottish dissenter on the Committee, thought there should be some form of public control over such advertisements.[30]

It is difficult to say to what extent these developments may already have come to pass, and how far the situation will develop in this direction. But one fact seems to be established, and that is that the Act has succeeded in its main aim of clearing the streets to an extent which is quite unexpected, and very satisfactory. Figures recently published for the Metropolitan Police District for the first three months of the Act's operation show that the number of prosecutions was no more than approximately 10 per cent. of the figure for the corresponding period in 1958,[31] and Mrs. Wilkinson found as a result of her inquiries that this trend was pretty general. How far it is temporary, and whether those who were frightened off the streets at first will eventually drift back, remains to be seen. It is too soon to come to any firm conclusion.[32]

However, if street offences have been reduced, it must follow that the use of premises for the purposes of prostitution has been increased, unless there has been a decline in prostitution generally. The very careful inquiry made by the Wolfenden Committee into the legal position governing premises used for the purpose of prostitution, and the recommendations for new powers to be given to the magistrates' courts,[33] have been completely ignored, presumably because the Government are not prepared to accept them. There is still much to be done to effect improvements in that direction.

J. E. Hall Williams.

29 Paras. 285–290, pp. 95–97.

30 Reservation I (e), p. 122.

31 Earl Bathurst gave these figures in reply to a question asked by Earl Winterton in the House of Lords, November 25, 1959: H.L.Parl.Deb. (5th ser.), Vol. 219, col. 918. The total number of prosecutions for offences against s. 1, Street Offences Act, 1959, was given as 464 in the first three months, compared with the figure of 4,318 prosecutions for similar offences in the Metropolitan Police Area in the same period in 1958.

32 *Loc. cit.*

33 Chap. XI, pp. 101–109.

The Landlord and Tenant (Furniture and Fittings) Act, 1959

It follows naturally from any attempt to control rents that landlords must not take premiums. If they are permitted to obtain a lump sum payment on the grant of a tenancy the whole scheme of rent control may effectively be evaded. The first of the Rent Acts, the five-section Act of 1915, therefore provided that a landlord "shall not in consideration of the grant, renewal or continuance of a tenancy . . . require the payment of any . . . premium . . . in addition to the rent. . . ." The only sanction for this prohibition was the right of the tenant to recover any such payment actually made.[1]

The succeeding Acts continued and extended this principle. The Act of 1920 substantially re-enacted the prohibition,[2] and added the force of the criminal law, making it an offence to require any payment or consideration in contravention of the prohibition.[3] The same Act also made it an offence for a statutory tenant (but not a contractual tenant) to "ask or receive the payment of any sum, or the giving of any other consideration," by anyone other than the landlord, as a condition of giving up possession.[4]

No doubt an easy way to get round the law soon presented itself. "This isn't a premium—it's just a payment for furniture." In view of the well-known doctrine that the courts will not inquire into the adequacy of consideration, it was thought necessary for the Act of 1923 to provide that "where the purchase of any furniture or other articles is required as a condition of the grant . . . of a tenancy . . ." the person asked to pay could request a written statement of the price demanded, and that the excess of the price demanded over the reasonable price should be treated as if it were a premium.[5]

The Act of 1949 consolidated these earlier provisions, and extended them in two ways: it was no longer possible to take a premium in relation to a term of fourteen years or more, and a contractual tenant could no longer require a premium for assigning his tenancy.[6] The Act of 1954 permitted premiums on the assignment of a lease originally granted for more than twenty-one years.[7] Finally, the Act of 1957 provided that requiring a loan should be treated as requiring a premium; furthermore, where a tenancy was

[1] The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 1 (2).

[2] The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 8 (1). The wording was now "shall not *as a condition of* the grant. . . ." S. 8 did not apply to terms of fourteen years or more: s. 8 (3).

[3] s. 8 (2). Maximum fine, £100. The criminal court could order repayment of the premium.

[4] Act of 1920, s. 15 (2).

[5] The Rent and Mortgage Interest Restrictions Act, 1923, s. 9 (1). Similar provisions applied to the statutory tenant who required the purchase of furniture: s. 9 (2).

[6] The Landlord and Tenant (Rent Control) Act, 1949, ss. 2 and 3.

[7] The Housing Repairs and Rents Act, 1954, s. 38 (1). But not on the grant of such a lease.

decontrolled by that Act the prohibition on premiums continues until July 1960, and the right to demand rent in advance is restricted.[8]

The Landlord and Tenant (Furniture and Fittings) Act, 1959, which was a private member's Bill with Government support, further strengthens the law as to excessive prices for furniture. The major defects with the existing law appear to have been these:

(a) It is doubtful whether the offence of requiring a premium [9] is committed merely by demanding a premium: it is arguable that there is no offence unless the premium is actually paid.[10]

(b) Even if the offence is committed by demanding a premium, there is not much incentive to prosecute so far as a prospective tenant is concerned. And although a successful applicant who has paid a premium, whether disguised as a sale of furniture or not, can prosecute, or sue to recover the premium, most people undoubtedly feel that it is rather distasteful to take legal proceedings.

(c) Since it was up to the applicant for accommodation to request a written statement of the price asked for furniture, such evidence of the price was often not available. Prospective tenants were naturally reluctant to press the landlord or assignor, knowing that there were other applicants who were prepared to pay without question.[11]

(d) Finally, another evidential difficulty was that the prospective tenant could only demand a written statement of the *price*: what furniture was available for that price was a matter for oral evidence.

In seeking to remedy these defects, the Act of 1959 creates three new criminal offences. It does not expressly deal with civil liability at all.

1. To deal with the two difficulties of evidence,[12] the Act provides that "Any person who, in connection with the proposed grant, renewal, continuance or assignment, on terms which require the purchase of furniture,[13] of a tenancy" in respect of which no premium may be taken, "fails to furnish, to any person seeking to obtain or retain accommodation whom he provides with particulars of the tenancy, a written inventory of the furniture, specifying the price sought for each item," is guilty of an offence.[14] The

[8] The Rent Act, 1957, ss. 13–15.
[9] 1949 Act, s. 2.
[10] See R. E. Megarry, *The Rent Acts* (8th ed., 1955), p. 407. The 1959 Act does not attempt to deal with the position in general terms, but only where the demand is for an unreasonably high price for furniture.
[11] See Mr. Graham Page, M.P., 597 H.C.Deb. 657 (December 12, 1958).
[12] Points (c) and (d), above.
[13] "Furniture" includes fittings and other articles: s. 1 (8).
[14] s. 1 (1) (*b*). Maximum fine, £100.

earlier right to demand a written statement of the price is repealed.[15] It seems that this offence may be committed not only by landlords or assignors, but also by estate agents and solicitors, so that it is presumably no longer possible to circulate particulars of tenancies unless a detailed, priced inventory is included. Moreover, the necessity of supplying the inventory is not limited to the case where the particulars of the tenancy are given in writing. It is, however, arguable whether the inventory must be provided where the furniture is merely available for purchase if desired, as opposed to a firm requirement that it be purchased. A landlord who would more willingly accept an offer from a tenant who wishes to purchase the furniture, but does not *require* its purchase, may perhaps escape the section.

2. The existing offence of requiring a premium, in all its uncertainty,[16] remains. In addition, it is now an offence for any person, in connection with the proposed grant, etc., of a controlled tenancy,[17] on terms which require the purchase of furniture, to offer the furniture " at a price which he knows or ought to know is unreasonably high," or otherwise to seek to obtain an unreasonably high price for the furniture.[18]

At least three difficulties in the application of this provision may arise. It seems that the terms of the grant or assignment must *require* the purchase of furniture, as noted in the comments on the inventory provision above. Secondly, the meaning of an " unreasonably high " price is not one which is clear beyond argument. Despite the statement in debate of the Government view,[19] it may be that this means the same as a price which " exceeds the reasonable price of the articles" in the existing offence.[20] It will be remembered that in *Eales* v. *Dale* [21] the Court of Appeal held that " by the phrase ' the reasonable price of the articles ' is meant the price which, in all the relevant circumstances, was the reasonable price for the parties to have agreed," [22] which might well exceed the market value of the articles. On the other hand, if the vendor of furniture asks for a price above the " reasonable price " as so defined, the court may have to determine whether the price asked is reasonably high (in which case no offence under the 1959 Act can have been committed) or unreasonably high, in which case the prosecution

[15] s. 2 (3).
[16] Point (a), above.
[17] Or, until July 1960, a tenancy decontrolled by the 1957 Act.
[18] S. 1 (1) (*a*).
[19] " We are not trying to penalise the individual who puts a price of £100 on furniture and fittings which . . . are worth perhaps only £70, £80 or £90. The person whom my honourable Friend . . . is trying to catch is the man who embarks on a deliberate fraud through this malpractice."—Mr. J. R. Bevins, M.P., Parliamentary Secretary to the Minister of Housing and Local Government, 597 H.C.Deb. 694 (December 12, 1958).
[20] 1949 Act, s. 3 (1) (*b*), following 1923 Act, s. 9 (1).
[21] [1954] 1 Q.B. 539 (C.A.).
[22] *Per* Evershed M.R. [1954] 1 Q.B. at p. 544.

must still show that the vendor knows or ought to know that it is unreasonably high. Perhaps few prosecutions need be brought.[23] Thirdly, the offence is committed by a person who *offers* furniture. No doubt "offers" is not used in its technical sense in the context of offer and acceptance and would include invitations to make offers.

3. The third offence created by the 1959 Act is in relation to the power of a local authority to enter premises to inspect furniture on twenty-four hours' notice. If entry is refused the local authority may obtain a magistrate's warrant on sworn information; wilful obstruction is then an offence.[24] It is clearly the intention of the Act that enforcement, including obtaining evidence of value of the furniture, will be the job of the local council, for in the words of the Bill's sponsor "it is to the local authority that the normal disgruntled seeker after accommodation goes first, because he believes that it is from the local authority that he can obtain most satisfaction."[25] To this end the local authorities' power to publish information is extended to this Act.

Aubrey L. Diamond.

[23] "I do not think that the measure of good legislation is the number of prosecutions it provokes, but the degree to which it stops offences": Mr. James MacColl, M.P., 604 H.C.Deb. 801 (April 24, 1959).

[24] 1959 Act, s. 1 (2)–(5). Maximum fine, £20 for first offence, £50 thereafter.

[25] Mr. Ray Mawby, M.P., 597 H.C.Deb. 652 (December 12, 1958). See point (b), above.

NOTES OF CASES

Nullity Jurisdiction

There is something to interest lawyers of several creeds in the decision of Collingwood J. in *Hill* (*orse. Petchey*) v. *Hill*.[1] Those who delight in a rigid theory of precedent will have their appetites stimulated by the sight of a High Court judge confessing inability to escape the binding force of a decision of the Court of Appeal; linguistic philosophers will be satiated by a hearty meal of verbal distinctions; and the student of law and society will have his digestion first upset by devious reasoning and finally settled by the good sense of the ultimate result.

Mrs. Hill petitioned in England for a decree of nullity on the ground of her husband's impotence. They had been married in Middlesex in 1950 but had separated in 1951. Mrs. Hill had obtained a separation and maintenance order and her husband had returned to Scotland, where he was admittedly domiciled. Sporadic reconciliation attempts failed and the wife finally petitioned for annulment in 1958. These facts pose a number of interesting questions. She could not petition for divorce on the ground of desertion, since, even if a case of desertion could have been proved, three years had not run before the magistrates made the non-cohabitation order in 1951. Further, she could not have petitioned in England for jurisdictional reasons. Mr. Hill was domiciled in Scotland and so his wife could neither claim England as her country of domicile nor invoke the jurisdiction of the English courts under section 18 of the Matrimonial Causes Act. She could presumably have followed her husband to Scotland but even then she would have been faced with the problem of inconvenience and expense. As it was, therefore, she petitioned in England.

She was easily able to establish her husband's incapacity for the purposes of her petition. Somewhat more of a problem was whether the court could justify assuming jurisdiction over a lady normally living in England but who had a husband living elsewhere in the United Kingdom and who based her claim to the court's attention simply on the fact that she had been married here. Collingwood J. in fact decided that he could hear the petition because it had once been the practice of the ecclesiastical courts to assume jurisdiction over marriages celebrated in England. The reference to the ecclesiastical courts and the variety of authorities on the significance of the *lex loci celebrationis* for jurisdictional purposes both call for comment.

[1] [1959] 3 All E.R. 754; also [1959] 3 W.L.R. 828.

It is now over a hundred years too late to question the sense in saying that the divorce court should follow the practices of the ecclesiastical courts with respect to nullity and judicial separation. Section 22 of the 1857 Act and now section 32 of the 1925 Judicature Act (in slightly different terms) have imposed that duty on the High Court. It is, of course, potentially dangerous to set such a limit to the aspirations of a society. Social, technical and scientific progress must necessarily create different attitudes, which in turn should be reflected in the decisions made. Accepted on its face value, this limitation *could* justify the continued use of the *cohabitatio triennalis* as the wisest test of impotence; it *could* require the courts to think of marriage as being only for the purposes of " lawful indulgence of the passions to prevent licentiousness, and the procreation of children, according to the evident design of Divine Providence," [2] or to categorise a husband's impotence as a " cruel wrong " to his wife.[3] In fact, some of the practices of the ecclesiastical courts were not as unambiguous as the framers of the statute hoped.[4] Turning to problems of jurisdiction, it is rather sad to think that, until we turn to legislation, our courts will have to stay bound by jurisdictional rules invented under such different conditions from those existing today. For many reasons, the nature and quantity of family litigation today bears little resemblance to that in the pre-1857 courts. Personal mobility now exists which was never dreamed of then, as jugglers of the conflict of laws rules have found to their cost. It is still not enough, for instance, for the petitioner alone to be resident in England for the courts to have nullity jurisdiction.[5] A family problem—which is a problem the world over—exists, and yet the courts may refuse to deal with it. If Mrs. Hill had been married at Gretna Green instead of Hornsey, presumably she would have had the expense, time and aggravation of several trips to West Lothian to bring a suit her husband could not be bothered to defend.

2 Dr. Lushington in *D-e* v. *A-g* (1845) 1 Rob.Eccl. 279, 298.

3 Lord Selborne L.C. in *G.* v. *M.* (1885) 10 App.Cas. 171, 201.

4 The decision of the House of Lords in *Baxter* v. *Baxter* [1948] A.C. 274 points up a number of the conflicting attitudes of ecclesiastical court judges. Some of the less permissive of these attitudes have recently been aired in *Scott* v. *Scott* (*orse. Fone*) [1959] 1 All E.R. 531 and *Morgan* v. *Morgan* (*orse. Ransom*) [1959] 1 All E.R. 539.

5 On the assumption that the petitioner is not domiciled in England and s. 18 of the Matrimonial Causes Act does not apply. It is a good illustration of the contrast between the exercise of jurisdiction in the ecclesiastical and the modern courts. The proposition is apparently based on the Statute of Citations, 1531, which provided that suits in the ecclesiastical courts should only be brought in the diocese in which the respondent resided. Even though this was the final criterion for deciding whether to assume jurisdiction, it was the practice to evade it by passing letters of request between dioceses (see generally, Phillimore, *Ecclesiastical Law* (2nd ed., 1895), vol. 2, pp. 985–999). The strain of inter-diocesan travelling no doubt compares very favourably with that involved in the international divorce and nullity disputes of 1960.

There is obviously some good sense in accepting jurisdiction to annul marriages celebrated in England. Our courts are naturally the best tribunals to decide whether the parties have observed the formalities prescribed by our law.[6] The same is not necessarily true, of course, if impotence, wilful refusal, insanity or bigamy is alleged but the courts have nonetheless conveniently accepted jurisdiction.[7] Normally, though, the marriage in England has coincided with other factors which have themselves been enough to give jurisdiction and so attention has often been denied to the fact of the marriage in England. In *Hutter* v. *Hutter* (*orse. Perry*),[8] *Easterbrook* v. *Easterbrook* (*orse. Jervis*)[9] and *Ramsay-Fairfax* (*orse. Scott-Gibson*) v. *Ramsay-Fairfax*,[10] for instance, the marriages were all either celebrated in England or in accordance with the Foreign Marriage Act. In each case the court assumed jurisdiction on the strength of the residence of both husband and wife in England. Indeed, in the two leading modern authorities where there was not this coincidence—*Inverclyde* (*orse. Tripp*) v. *Inverclyde*[11] and *Casey* v. *Casey*[12]—the courts refused jurisdiction. Bateson J. in *Inverclyde* (a petition on the ground of impotence) made the very common-sensible remark that the purpose of suits for divorce and nullity was very much the same and that a decree annulling a voidable marriage was almost identical with a divorce decree. He then proceeded to refuse jurisdiction on the ground that the husband was not domiciled in England. *Easterbrook* and *Hutter* both later refused to accept the validity of this reasoning and pointed out that domicile had never been the exclusive test of nullity jurisdiction in the ecclesiastical courts. What is more, they could not accept that the distinction between void and voidable marriages could have any relevance in jurisdictional issues. *Casey*, however, resurrected much of what had been said in *Inverclyde*.

[6] See, *e.g.*, *Sottomayer* v. *De Barros* (1877) 3 P.D. 1 at p. 5, *per* Cotton L.J.; *Casey* v. *Casey* [1949] 2 All E.R. 110 at pp. 113–114, *per* Bucknill L.J.; *ibid.* at pp. 117–118, *per* Somervell L.J.

[7] *e.g.*, *Linke* (*orse. Van Aerde*) v. *Van Aerde* (1894) 10 T.L.R. 426; *Cooper* v. *Crane* [1891] P. 369. It is interesting to note here the interesting leeway which the modern courts have assumed in their investigation of the practices of the ecclesiastical courts. Not one single decision cited in *Hill* v. *Hill* is an authority for the proposition that the ecclesiastical courts did assume jurisdiction where the marriage was celebrated in England. From *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67 onwards, the civil courts have *assumed* the proposition to be true. And even in *Simonin* v. *Mallac* the authorities cited merely support the thesis that the validity of the marriage should be decided according to the law of the place where it was celebrated (see esp. *Scrimshire* v. *Scrimshire* (1752) 2 Hagg. Con. 395; *Butler* v. *Dobson* (1756) 2 Lee 312; *Sinclair* v. *Sinclair* (1798) 1 Hagg.Con. 294; *Dalrymple* v. *Dalrymple* (1811) 2 Hagg.Con. 54; *Conway* v. *Beazley* (1831) 3 Hagg.Con. 639; *Munro* v. *Munro* (1840) 7 Cl. & Fin. 842; *Connelly* v. *Connelly* (1851) 7 Moo.P.C. 438).

[8] [1944] P. 95; [1944] 2 All E.R. 368.

[9] [1944] P. 10; [1944] 1 All E.R. 90.

[10] [1956] P. 115; [1955] 2 All E.R. 709.

[11] [1931] P. 29.

[12] [1949] P. 420; [1949] 2 All E.R. 110.

Bucknill L.J. in particular based his judgment on the close similarity between a petition for wilful refusal and a divorce petition. He thought it possible that there might "be an exception to the rule in the case of a voidable marriage where both parties are resident in the country where the petition is filed" (but did not justify this sudden expansiveness), yet could not "see the necessity of making an exception on the ground that the marriage has been celebrated in the country where jurisdiction is invoked." Finally, in *Ramsay-Fairfax*, the Court of Appeal chopped *Inverclyde* down to size as being based on too rigid a view of jurisdictional requirements. The only legitimate way to approach the problem, Denning L.J. (as he then was) and Hodson L.J. stressed, was to follow the elusive practices of the ecclesiastical courts.

Collingwood J. in *Hill* was therefore faced with a much-battered *Casey*. True to his role as a lower court judge, he had to admit that he was bound by this decision of the Court of Appeal because it had never been expressly repudiated by that court. In view of the doubt felt about its basic reasoning by two of his peers in the High Court, by a later Court of Appeal and by Lord MacDermott in *Addison* v. *Addison*,[13] however, he thought that he should review it carefully. Applying the familiar formula of limiting it to its facts, therefore—a device which never fails to be popular with judges who do not like a binding decision of a higher court—he concluded that the celebration of the marriage in England would give nullity jurisdiction in cases of impotence but not in cases of wilful refusal to consummate.

If we are bothered about symmetry, we shall have to wait for another decision of the Court of Appeal before we can leave *Casey* out of our textbooks. *Hill* creates havoc among the neatly laid rules but, in all fairness, it was a havoc forced upon Collingwood J. by the inconsistent decisions in the earlier courts. Now, though, we have to contend not only with the exasperating and futile distinction between void and voidable marriages[14] but also with an artificial cleft between the two grounds for nullity which are most frequently pleaded together.

Alan Milner.

[13] [1955] N.I. 1.

[14] The distinction apparently saw first light in the 1830s as the result of the intervention of the common law courts in the practices of the ecclesiastical courts. The succession to property was protected by preventing a marriage being annulled for impotence after the death of one of the parties to it: see *Ray* v. *Sherwood* (1836) 1 Curt. 173, 188; *Harthan* v. *Harthan* [1948] 2 All E.R. 639, 645. Almost all of the fangs of the distinction have now been removed, especially since the Legitimacy Act, 1959. Unless the decision of Collingwood J. in *Hill* is to be taken as modifying *De Reneville* ([1948] P. 100; [1948] 1 All E.R. 56), though, the distinction will still affect nullity jurisdiction where the question of domicile or no domicile is raised. Again, though, an assiduous search of the ecclesiastical authorities may well show that those courts were not bothered about drawing this fine line.

Trespass or Nuisance

The judgment in the recent Canadian case of *Mann* v. *Saulnier* [1] raised a number of points on trespass to land and nuisance and the opinion of the Supreme Court of New Brunswick both lends support to English textbook suggestions on the operation of inevitable accident as a defence and suggests qualifications to dicta in the judgment of McNair J. in *Kelsen* v. *Imperial Tobacco Co.*[2] where it was held that the intrusion of an advertisement some four inches into the airspace of a neighbouring occupier amounted to trespass, not nuisance.

The facts of *Mann* v. *Saulnier* were that in 1955 the defendant built a fence along the boundary line between his land and that of the plaintiff. Three years later the top of the fence was found to be leaning three and three-quarter inches to one and three-quarters of an inch over the plaintiff's property. In the court below the plaintiff succeeded on the ground of trespass and the defendant appealed to the Supreme Court of New Brunswick. Here the defendant pleaded inevitable accident alleging that frost and snow had caused the fence to lean. West J.A., delivering the judgment of the court, said that the authorities cited on inevitable accident —*Weaver* v. *Ward*,[3] *National Coal Board* v. *Evans* [4] and *Walmesley* v. *Hummenick* [5]—were all cases of trespass against persons or personal property. He continued:

> "There was no case submitted, nor can I find any, wherein such principle has been applied to trespass to land. However, *Salmond on Torts* [6] states: 'But as it now seems settled that inevitable accident is a defence in actions of trespass to the person and to chattels it would be strange if a different rule governed trespass to land.' It is difficult to disagree with the logic of this statement."

The court, however, found that it was not necessary to decide this point since the injury not being direct [7] was not trespassory but at the most a nuisance since it could be regarded as analogous to the incursion of branches and roots of trees. *Lemmon* v. *Webb* [8] in the Court of Appeal was cited in this connection.

The Supreme Court went on to say that, though nuisance had not been pleaded expressly and though the pleadings were "somewhat restricted," modern pleadings do not depend on the forms of action and those in the present case could be taken as alleging

[1] (1959) 19 D.L.R. (2d) 130.
[2] [1957] 2 Q.B. 334. See 20 M.L.R. 499.
[3] (1616) Hob. 134.
[4] [1951] 2 K.B. 861.
[5] [1954] 2 D.L.R. 232.
[6] 12th ed., p. 157.
[7] *Salmond on Torts*, 12th ed., p. 160–161, was cited for the distinction between direct and indirect injury.
[8] [1894] 3 Ch. 1 at p. 24, *per* Kay L.J.

nuisance. The plaintiff, however, failed because nuisance not being actionable *per se* he had neither pleaded nor proved actual damage. It will be recalled that in *Kelsen* v. *Imperial Tobacco Co.* McNair J. said that the success or failure of the plaintiff's case depended on the distinction between trespass and nuisance. The relevant passage runs [9]:

> "This leads me to the next and, in some ways, the most interesting point of the case, namely whether an invasion of an airspace by a sign of this nature gives rise to an action in trespass or whether the rights, if any, of the owner of the airspace are limited to complaining of nuisance, for if his rights are so limited it is clear on the facts of this case that no nuisance was created since the presence of the sign in the position which it occupied on the wall of the adjoining premises caused no inconvenience and no interference with the plaintiff's use of his airspace."

After examining the conflicting authorities McNair J. reached the conclusion that an intrusion into airspace amounted to trespass. *Mann* v. *Saulnier*, which appears to be well founded in principle on the old authorities, supports Winfield's suggestion that an indirectly caused projection is only a nuisance.[10]

It may seem a little surprising that on the issue of damage in nuisance no allusion was made in either the English or the Canadian case to the fact that when artificial projections have been treated as nuisances the courts have been ready to presume damage. This is illustrated in *Baten's Case* [11] and *Fay* v. *Prentice*.[12] This presumption is made not only because the court notices that it rains from time to time and that rain may flow off the projection onto the ground beneath but also because the long continuance of the projection will give a prescriptive right to its retention, and thus the injured party may be permanently deprived of some part of his airspace.[13] The Canadian court may have overlooked the question of prescription in pressing the analogy between the leaning fence and the branches of *Lemmon* v. *Webb*, for in the passage which they cite from *Lemmon* v. *Webb* there is a direct statement by Kay L.J. that the nuisance in that case would give rise to no prescriptive rights. This is true for boughs because the burden on the servient tenement is continually changing [14] but this reasoning is obviously not generally applicable to artificial structures. Perhaps, however, if the question had been investigated, it would have been found that the Canadian fence, like the Tower of Pisa, was slowly but continuously changing its angle of incline and thus the

[9] [1957] 2 Q.B. at 343.
[10] See *Winfield on Torts*, 6th ed., p. 379.
[11] (1610) 9 Rep. 53.
[12] (1845) 1 C.B. 828.
[13] See Fleming, *Tort*, p. 424.
[14] See *per* Lord Herschell in *Lemmon* v. *Webb* [1895] A.C. 1 at 6.

change of burden argument that applies in the case of tree branches could have been properly applied to it also.

In saying that there was "no nuisance" in *Kelsen's* case, McNair J. must be taken to have meant no actionable nuisance, not no abatable nuisance, since there is authority for the proposition that such artificial projections may be removed by the occupier into whose airspace they protrude even though they cause no actual harm.[15] Thus the failure to presume damage in the circumstances of *Kelsen's* case and *Mann* v. *Saulnier* means that the plaintiff is thrown back on abatement and the oft-stated judicial policy of discouraging abatement is to that extent defeated. In *Lagan Navigation Co.* v. *Lambeg Bleaching Co.*[16] it was said: "The abatement of a nuisance is a remedy which the law does not favour and is not usually advisable." Hale wrote of the remedy of abatement: "But because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary courts of justice."[17]

Thus, these authorities would appear to give strong indirect support to a liberal use of the presumption in *Baten's Case* and *Fay* v. *Prentice*, for if the presumption is not freely applied it would seem to follow that in the case of every artificial projection where there is the slightest doubt as to whether the intrusion was directly caused and as to whether substantial damage had resulted the aggrieved party will resort in the first instance to abatement.

A. H. Hudson.

Local Authorities and the Middle Ages

In 1466, in the case commonly known as the *Case of Thorns*,[1] Brian J. gave expression to the medieval idea of civil liability in the following words: "When a man does a thing, he is bound to do it in such a way that by his acts he causes no damage to others. If, for instance, I am building a house, and while the timber is being put up into position a piece falls on my neighbour's house, he will have a right of action, though the building of the house was lawful, and the timber fell *me invito*. So, too, if a man assaults me, and I cannot avoid him, but as he is about to hit me, I in my defence raise my strick to strike him, and there is one behind me, and in raising my stick I hurt him, in this case he has a right of action against me, though the raising of my stick in self-defence was lawful, and though I hurt him *me invito*."

[15] *Penruddock's Case* (1597) 5 Rep. 100a at 101b; *Wandsworth Board of Works* v. *United Telephone Co.* (1884) 13 Q.B.D. 904, 927, *per* Fry L.J.

[16] [1927] A.C. 226, 244.

[17] De Port.Mar. (Hargrave's *Law Tracts*) Part ii, c. 7. See *Salmond on Torts*, 12th ed., pp. 772–773.

[1] Y.B. 6 Edw. IV, Mich. pl. 18.

In 1959, the defendant in *Kensington Borough Council* v. *Walters* [2] was driving with all care along Cromwell Road in London when another car shot out of a nearside turning, ramming the defendant's car into the central street refuge, which was badly damaged.

The Kensington Borough Council, to whom the street refuge belonged, brought summary proceedings against the defendant for £25 0s. 1d., being the expenses incurred in having the refuge repaired, under section 181 (3) of the London Government Act, 1939: "If any person accidentally or carelessly damages any property vested in a local authority, the authority may recover from him summarily as a civil debt the expenses incurred by it in making good the damage."

The magistrates found for the defendant, but, on appeal, the Divisional Court found against him. It was all a question of the meaning of section 181 (3), and on this Lord Parker C.J. said, "Section 181 (3) does not relate to anybody but the person who actually does the accidental or careless act, whether voluntarily or involuntarily, as in this case, where he was forced into the street refuge." [3]

Nevertheless, the defendant did have the undivided sympathy of the court in his remarkable predicament. "It does seem strange," observed Cassels J., "that if a pedestrian walking along the High Street, Kensington, should be pushed through a window belonging to the local authority, . . . the local authority receiving him through the broken window can put out their hands and say: 'The damage is so much.'" [4] "Strange" is a masterly understatement. While the rest of us must jog along with our twentieth-century rights, for local authorities, it appears, only the Middle Ages will do.

C. Grunfeld.

Diminished Responsibility in Murder and the Role of the Judiciary

The fear expressed by the present writer in reviewing the case of *Spriggs* [1] in this journal in May 1958,[2] that the courts were in danger of abdicating their responsibility for assisting the jury with regard to the meaning and scope of the new defence of diminished responsibility, under section 2 (1) of the Homicide Act, 1957, has now been partially allayed by the recent decision in *R.* v. *Walden*.[3]

The accused was a 33-year-old assistant lecturer at Rotherham Technical College who had unsuccessfully proposed marriage to a

[2] [1959] 3 W.L.R. 945. (See also [1959] 3 All E.R. 652.)
[3] At p. 948.
[4] At p. 949.
[1] [1958] 2 W.L.R. 162; [1958] 1 All E.R. 300; 42 Cr.App.R. 69.
[2] (1958) 21 M.L.R. 318.
[3] [1959] 1 W.L.R. 1008; [1959] 3 All E.R. 203; 43 Cr.App.R. 201.

21-year-old girl employed in the college office, the girl preferring the attentions of a student at the college of the same age as herself. A week later he shot and killed them both on the college premises, and ran off in his car. Three weeks afterwards he was picked up by the police at Reading, and charged with the capital murder of the two victims of the shooting.

At the trial he was convicted, there being no dispute that he caused the deaths, but evidence was adduced for the defence with a view to proving that the accused was suffering from diminished responsibility within the meaning of section 2 (1) of the Homicide Act, 1957. In reply, the prosecution called the senior medical officer of the prison where Walden had been in custody awaiting trial, who testified that he could not detect any signs of the chronic paranoid development to which the defence psychiatrist had testified, or of any mental disorder or defect. A consultant psychiatrist supported this view.

It was therefore left to the jury to decide upon the evidence whether the diminished responsibility had been made out "upon balance of probability." The jury convicted the appellant of capital murder upon each count. In summing up to the jury, the trial judge, Paull J., handed to the jury a copy of section 2 of the Homicide Act and directed them as follows:

> After referring to the definition of insanity in the M'Naughten Rules, he said: "There are some cases, you may think, where a man has nearly got to that condition but not quite, where he is wandering on the borderline between being insane and sane, where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the borderline, poor fellow. He is not really fully responsible for what he has done.' Now, you may think, and it is entirely a matter for you, that that is what is meant by those words in the Act of Parliament, 'such abnormality . . . as substantially impairs his mental responsibility.' In other words, he is not really responsible for what he has done. His responsibility, if not wholly gone, has been impaired. . . ."

The applicant sought leave to appeal against his conviction on the grounds that the judge had misdirected the jury by attempting to redefine that which Parliament had already defined in section 2 (1) of the Homicide Act, 1957, and by misconstruing the words of the section. He had tried to tell the jury what he thought the subsection really meant, though that was a matter entirely for the jury. The judge should merely have read the exact terms of the subsection to the jury and left them to decide its meaning. That was the principle laid down in *Spriggs*. The judge was not entitled to do more than call the jury's attention to the exact words of the section and leave them to say whether upon the evidence they were satisfied that the case came within the section, and it followed that

if the judge said anything whatever to the jury by way of explanation or illustration (as he did in this case), that was a misdirection.

In the course of the argument, Hilbery J., who presided in the hearing of the appeal, is reported to have said: "Suppose the jury ask what they are to understand by abnormality of mind. If the judge cannot tell them, we are getting very near to trial by doctor." [4] One imagines that this would be a situation repugnant to the courts. It is hardly surprising therefore that in its reserved judgment, the Court of Criminal Appeal felt constrained to dismiss the application for leave to appeal. They could not accept the consequences which were thought to flow from the decision in *Spriggs*. They therefore resiled from the extreme position which had previously been adopted, and took up a position at least halfway back. This required some interpretation of *Spriggs* other than that which had been advanced by defence counsel. This is what the court said:

Spriggs did not decide that the judge was not entitled, in order to assist the jury upon the facts of the case before them, to point out to them by way of illustration or explanation the sort of thing which they could look for to see if the case came within the section. Indeed, the reference by Lord Goddard in *Spriggs* to the Scottish case of *H.M. Advocate* v. *Braithwaite* [5] was to a case where Lord Cooper had explained to the jury the sort of things to look for. Though it is a sufficient direction if the judge draws the attention of the jury to the exact terms of the section, that does not mean that it is a misdirection if he points out to the jury the sort of things which they could look for in order to decide the question of diminished responsibility.

So we appear to have reached this position. While the judge at the trial should not attempt to redefine the words of the section dealing with diminished responsibility, he can explain and illustrate them in the way which the Scottish judges have done with regard to their concept of diminished responsibility, and in the way which Paull J. did in the present case. But it will not be a misdirection if he merely refers the jury to the words of the section.

There are two further points which emerge from the decision in *Walden*. It is declared that the expression "such abnormality of mind . . . as substantially impaired his mental responsibility" which is contained in the definition "connotes a question of degree and questions of degree are questions of fact in each case." [6] So the learned trial judge was right in directing the jury that it was a question for them and not for him to decide whether upon the facts the applicant brought himself within the section or not.

Furthermore, it is said that although Parliament has set out in section 2 (1) the matters of fact which must be proved in order

[4] *The Times*, July 28, 1959.
[5] 1945 S.C.(J.) 55.
[6] *Loc. cit.* 1011.

to establish a plea of diminished responsibility, Parliament has not defined the terms "abnormality of mind" or "mental responsibility" or indeed any of the other expressions used in the section. If this is accepted, what are we now to make of Lord Goddard's statement in *Spriggs* that Parliament has defined these matters and it is not for the courts to redefine them?

It is suggested that the possible explanation for these rather confusing developments is as follows. At the time when the defence of diminished responsibility was introduced into English law, there was a real danger that the judges might, by interpretation of the words of the section, so alter or modify the scope of the defence as to defeat Parliament's purpose. Indeed the prospect of another judicial muddle similar to that over the M'Naughten Rules was by no means remote. Lord Goddard in *Spriggs* averted this danger by telling the courts that it was no concern of the judge to interfere in this matter. But this development was purchased at too great a price, in terms of depriving the jury of assistance and guidance from the judge. Consequently it has now been modified to enable a more healthy and helpful partnership to be developed between the judge and jury in resolving this difficult question. It is now abundantly clear that the decision whether diminished responsibility applies lies within the province of the jury, but they are not to be prevented from having the assistance of the judge by way of explanation or illustration of the meaning of the section. It is conceived, for example, that it would not be proper for the judge to rule that a person of normal intelligence who it was said was a psychopathic personality could in no circumstances be regarded as suffering from diminished responsibility, and provided there was some evidence in this direction, it would be a matter for the jury to decide. They could of course be assisted by explanation or illustration by the judge.

J. E. Hall Williams.

Civil Servants: Insecurity of Tenure

Riordan v. *War Office* [1] throws into relief once more one of the most unsatisfactory portions of the entire law of employment, the peculiarly exposed legal position of the civil servant.

The plaintiff was an unestablished civil servant employed by the War Office under the terms of the War Office (Outstations) Civilian Staff Regulations, 1950. These "regulations" were made by the Army Council pursuant to letters patent conferring upon them such power and authority as were formerly exercised under the prerogative by the Secretary of State, Commander-in-Chief and other principal officers commanding under the Secretary of State. In

[1] [1959] 1 W.L.R. 1046; also [1959] 3 All E.R. 552.

other words, the "regulations" were so in word alone: they were not of statutory origin or force but merely "instructions by the Army Council on behalf of the Sovereign of the terms upon which civilian employees are to be engaged." [2]

The regulations state that each employee is to be informed that the terms of his service are subject to the regulations, and they go on to deal, *inter alia*, with hours of work, including overtime, sick pay, conduct and discipline and termination of employment by either side, two weeks' notice in writing being stipulated for a discharge when the employee's services are no longer required, and one week's notice in writing for a resignation.

Some trouble arose between Riordan and his immediate superior, the stores foreman. As a result, on Friday, April 13, Riordan filled in a form of resignation as required by the regulations, without however signing or dating it, and handed it to the stores superintendent for transmission to the proper authority, the commanding officer. When asked more than once by the superintendent whether he really wanted to resign, Riordan insisted that he did. His notice of resignation reached the commanding officer on the following Monday. Riordan, meanwhile, had regretted his decision and tried to withdraw his resignation. The commanding officer, however, decided not to accede and despite Riordan's protests wrote him to say his services were dispensed with four days hence on April 20. Riordan sued the War Office for damages for wrongful dismissal.

Diplock J.'s primary ground of decision was that Riordan had duly resigned and not been dismissed. The learned judge rejected the argument that Riordan had withdrawn his resignation before the Monday when the commanding officer received and acted on it in the following important passage: "The giving of a notice terminating a contractual employment . . . is the exercise of the right under the contract of employment to bring the contract to an end, either immediately or in the future. It is a unilateral act, requiring no acceptance by the other party, and, like a notice to quit a tenancy, once given it cannot in my view be withdrawn save by mutual consent." [3]

However, Diplock J., despite the strong hints by counsel for the War Office not to "embarrass the Crown by adding my own to the many *obiter dicta* on the question of whether there exists a contract of employment in the strict sense between the Crown and those in its employment," [4] added his views on what the legal position would have been had the commanding officer's letter to Riordan in fact amounted to a dismissal at four days' notice in breach of the express terms of the employment relationship.

The preponderant weight of authority regards the employment

[2] At p. 1050.
[3] At p. 1054.
[4] At p. 1052.

relationship between Crown and servant as a contractual one.[5] In *Riordan*, Diplock J. added his own authority, saying: "Whether this involves what is strictly a contractual relationship between the Crown and persons who have assented to serve subject to the regulations . . . or not, it seems to me that it is at least sufficiently analogous to a contractual relationship to make it proper for me to construe the regulations in the same way as I would the terms of a contract of employment."[6]

It is "axiomatic"[7] that the Crown has power to terminate Crown employment at pleasure. The preponderant weight of authority, again, is that this power is based on an implied term or condition in the contract of employment.[8] This common law implied term is, however, anomalous in the realm of contract since it may not be displaced by any express contractual term[9]; it is displaceable only by "law," that is to say, statutory law.[10] Thus, in *Riordan*, Diplock J. held the War Office instructions could not deprive the Crown of the power to dismiss Riordan on the spot, let alone at four days' notice, since the regulations had only contractual and not statutory force.

It is an interesting if uncertain point how far the Crown is bound by any other express terms than those relating to length of service or dismissal. In the case of the military servant, the Crown clearly is not: "all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown."[11] As to civil servants, however, the point still awaits the accident of litigation. Even if the same rule applies to civil as to military servants, there remains the question whether the civil servant himself is bound by the express terms of his relationship with the Crown. In *Riordan*, for example, might the Crown have sued Riordan for damages had he left his employment without giving the stipulated week's notice in writing,[12] or has the Crown servant the same privilege as the Crown?

[5] *De Dohsé* v. *R.* (1886) 66 L.J.Q.B. 422n., 423; *Gould* v. *Stuart* [1896] A.C. 575, 578; *Dunn* v. *R.* [1896] 1 Q.B. 116, 118–119; *Denning* v. *Secretary of State for India* (1920) 37 T.L.R. 138; *Hales* v. *R.* (1918) 34 T.L.R. 589; *Reilly* v. *R.* [1934] A.C. 176, 179, 180; *Robertson* v. *M. O. P.* [1949] 1 K.B. 227, 231; *Riordan's* case itself, *supra*. *Cf. Shenton* v. *Smith* [1895] A.C. 229, 233; *Rodwell* v. *Thomas* [1944] K.B. 596, 601. But see *Mitchell* v. *R.* [1896] 1 Q.B. 121n., 122, 123, and *I. R. C.* v. *Hambrook* [1956] 2 Q.B. 641, 653, 671 (noted in 19 M.L.R. 701), where the question whether there may be an *express* contractual relationship is left open.

[6] At p. 1052–1053.

[7] *I. R. C.* v. *Hambrook*, *supra*, p. 653 (*per* Lord Goddard C.J.).

[8] *Shenton* v. *Smith*, *supra*, p. 235; *Gould* v. *Stuart*, *supra*, p. 578; *Dunn* v. *R.*, *supra*, p. 119; *Reilly* v. *R.*, *supra*, p. 179; *De Dohsé* v. *R.*, *supra*, p. 423.

[9] There are contrary dicta of Lord Atkin in *Reilly* v. *R.*, *supra*, p. 179, and Denning J. (as he then was) in *Robertson* v. *M. O. P.*, *supra*, p. 231, but they are against the general run of the cases.

[10] *Mitchell* v. *R.*, *supra*, pp. 122–123; *Riordan's* case itself, *supra*. *Cf.* 19 M.L.R. p. 703.

[11] *Mitchell* v. *R.*, *supra*, p. 122.

[12] A true "unilateral contract"? *Cf.* Wade and Phillips, *Constitutional Law* (5th ed.), at p. 334.

Whatever the legal standing of express terms in the Crown relationship, both sides are doubtless bound by certain implied terms. The servant must be subject to the duties implied at common law in the contract of employment to be ready and willing to work, obey orders, give faithful service, not misconduct himself, show reasonable competence, take reasonable care.[13] Conversely, the Crown must be liable in damages if the servant is injured as a result of breach of the various common law duties on the employer's part to take reasonable care for the servant's safety, duties which, since *Matthews* v. *Kuwait Bechtel Corporation*,[14] lie in contract as well as in tort.[15] Further, according to Lord Goddard C.J., the servant may recover arrears of remuneration for work done in implied contract on a quantum meruit.[16] And we return, finally, to the implied term that the Crown may dismiss at pleasure, and its extraordinarily unfair consequences.

This implied term and its overriding force relative to express terms in the contract have been referred by the courts to public policy, public interest, the public good: "in remote places on the frontiers of our territory the question of peace or war might depend on the action of a civil servant . . . ,"[17], or, more prosaically, "The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service."[18]

That the Crown must have power, if need arises, to remove civil as well as military servants on the spot without a moment's notice is beyond debate. It is also beside the point. Any employer may discharge any employee, high or humble, without a moment's notice, and the courts will on no account[19] order him to take the employee back; they will merely award damages if the dismissal was in breach of the contract of employment. So, even if there were no Crown pleasure rule, the Crown would still be free as an employer to discharge on the spot irrespective of any specified duration of employment, or period of notice or dismissal procedure stipulated by the express terms of the employment. But, what public interest, what public good, what public policy requires that civil (not to speak of military) servants, dismissed without cause in a manner

[13] *Cf. Rodwell* v. *Thomas* [1944] K.B. 596; *McClelland* v. *N. Ireland Health Board* [1957] 2 All E.R. 129, 134, 141.

[14] [1959] 2 Q.B. 57 (noted in 22 M.L.R. 521).

[15] These duties can hardly be said to fetter the Crown's discretion.

[16] *Terrell* v. *Sec. of State for the Colonies* [1953] 2 Q.B. 482, 499 (noted in 16 M.L.R. 502); *I. R. C.* v. *Hambrook*, *supra*, p. 654.

[17] *Dunn* v. *R.*, *supra*, p. 120.

[18] *Shenton* v. *Smith*, *supra*, p. 235.

[19] Even in exceptional "status" situations like that in *Vine* v. *National Dock Labour Board* [1957] A.C. 488, the courts have not gone beyond a declaration of rights.

violating the express terms of their engagement, should receive no compensation? [20]

C. Grunfeld.

The Carriage of Goods by Sea Act, 1924, and the Doctrine of "Stages"

The decision of the Judicial Committee of the Privy Council in *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.*,[1] has once again brought into prominence the vexed question of the effect of the Carriage of Goods by Sea Act, 1924, on the common law doctrine of "stages" laid down in relation to the absolute warranty of seaworthiness in English law.

The Carriage of Goods by Sea Act, 1924, provides by article III, rule 1 of the Schedule, that: "The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to (*a*) make the ship seaworthy."

The attitude of the authors of the standard textbooks on the significance of the words "before and at the beginning of the voyage" is a varied one. Some writers confine their attention to the possible effect that they might have on the doctrine of stages *after* the vessel has sailed. Cole [2] says that proceeding on the second stage of a voyage with insufficient coal would be a default of the carrier in the navigation or management of the ship, for which, by article IV, rule 2 (*a*) he was not responsible. A similar view is reached by Scrutton.[3] However, Temperley and Vaughan [4] are radically opposed to this opinion, for they say that the courts might give a wide interpretation to the word "voyage," and interpret it as meaning each stage of the voyage. Therefore shipowners should exercise due diligence at the beginning of each stage of a voyage in stages to make the ship seaworthy. Maclachan [5] thinks than such an interpretation would do violence to the clear words of the Act.

But two of the books consider the situation before the vessel sails. Maclachlan [6] thinks that the word "before" would be construed as meaning "at the commencement of loading," and the words "at the beginning of the voyage" as meaning "when the vessel actually sails." Carver [7] is of the opinion that the authorities relating to

[20] *Cf.* Hood Phillips, *Constitutional Law* (2nd ed.), p. 432. The Crown pleasure rule makes something of a mockery of the Fair Wages Resolution of the House of Commons, in pursuit of which government departments insist on outside contractors being model employers, when the Crown itself appears to fall somewhat short of that ideal.

[1] [1959] 3 W.L.R. 232; [1959] 2 All E.R. 740. The case in the courts below is reported at [1952] Ex.C.R. 569; [1956] Ex.C.R. 234; [1957] S.C.R. 801.

[2] S. D. Cole, *Carriage of Goods by Sea Act, 1924*, p. 57.

[3] *Charterparties and Bills of Lading* (16th ed., 1955), p. 473. See also Carver, *The Carriage of Goods by Sea* (10th ed., 1957), p. 184.

[4] *Carriage of Goods by Sea Act, 1924* (4th ed., 1932), p. 25.

[5] *Merchant Shipping* (7th ed., 1932), p. 371.

[6] *Ibid.* p. 370.

[7] *Op. cit.* p. 184.

loading and lying stages are applicable to cases covered by the Act and raises a point not mentioned in the other books, *viz.*, whether the obligation of seaworthiness is a continuing one until the vessel sails, but comes down in favour of the view that it is not, for the words "before and at the beginning of the voyage" qualify the exercise of due diligence and not the making of the ship seaworthy.

In *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine Ltd.*[8] the loading of No. 3 hold of a ship at Halifax, Nova Scotia, began on Tuesday, February 3, 1942, and finished on Friday, February 6. The loading of all cargo was completed at 8.15 p.m. on that evening. The intention was to sail on Saturday. On the Friday morning some scupper pipes passing through the hold were found to be frozen, and were thawed out by an acetylene torch used by an employee of a firm which had arranged to do this work for the shipowners. The heat of the torch started a fire in the cork insulation round the pipes, and in spite of efforts to extinguish it the master was forced to scuttle the ship on Saturday at 5.30 a.m. The shippers' cargo, which had been loaded in No. 3 hold, was lost and they sued the shipowners for non-delivery.

The Judicial Committee of the Privy Council held that from the time when the ship caught on fire she was unseaworthy, and that this caused the loss of the cargo. Further, the negligence of the shipowners' servants which caused the fire was a failure to exercise due diligence. One of the questions that arose was whether the obligation was only to exercise due diligence to make the ship seaworthy at two moments of time, *viz.*, the beginning of the loading and the beginning of the voyage.

The evidence was conflicting as to the precise time when the goods had been loaded. They might have been stowed before the fire started, but in their lordships' opinion this did not matter, for the obligation to exercise due diligence was a continuing one.

Lord Somervell of Harrow said that it was difficult to believe that the construction of the word "before" could have been argued but for the fact that the doctrine of stages had been laid down in relation to the absolute warranty of seaworthiness. He then observed[9]:

> "In their lordships' opinion 'before and at the beginning of the voyage' means the period from at least the beginning of the loading until the vessel starts on her voyage. The word 'before' cannot in their opinion be read as meaning 'at the commencement of the loading.' If this had been intended it would have been said. The question when precisely the period begins does not arise in this case, hence the insertion above of the words 'at least.' On that view, the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank."

[8] *Supra.*
[9] [1959] 3 W.L.R. 232 at 239; [1959] 2 All E.R. 740 at 744.

With reference to the doctrine of "stages" the learned Lord of Appeal in Ordinary said that it "had its anomalies and some important matters were never elucidated by authority. When the warranty was absolute it seems at any rate intelligible to restrict it to certain points of time. It would be surprising if a duty to exercise due diligence ceased as soon as loading began only to reappear later shortly before the beginning of the voyage."

The Judicial Committee of the Privy Council have thus disapproved of the view of Maclachlan that "before" means "at the commencement of loading," and that of Carver that the obligation is not a continuing one. But it is submitted that if the legislature had intended the obligation to have been a continuing one, it would have said so in words such as "the carrier shall exercise due diligence to make the ship seaworthy at least at the commencement of loading and until she sails on her voyage."

It is to be observed that the *Maxine* [10] case did not deal with the question of the effect of the Carriage of Goods by Sea Act, 1924, on the doctrine of stages *after* the vessel has sailed, though it seems implicit in the speech of Lord Somervell that this doctrine has ceased to exist in the case of bills of lading to which the Act applies.[11] Further, the Judicial Committee has been careful not to define the period from which the obligation commences. Reliance may still be placed on a dictum by Wright J. (as he then was) in *W. Angliss & Co. (Australia) Proprietary, Ltd.* v. *Peninsular & Oriental Steam Navigation Co.*[12] concerning an even earlier time at which it might start. In that case he observed [13]:

> "It was argued on behalf of the (shipowners) that the obligation only attached in respect of matters at the port of loading, the words being 'before and at the commencement of the voyage' and the obligation being only in favour of the particular shipper, and dating at earliest from the time of the material contract of carriage between that shipper and the carrier. In a sense I think that this is true, but, if the vessel were in fact unfit owing to some earlier breach of due diligence in that regard by the carrier, his agents, or servants, I think that the carrier would be liable on the ground of actual or imputed knowledge of the defects or failure to use due diligence continuing to the date relevant to the particular contract."

E. R. Hardy-Ivamy.

The Case of the Unmerchantable Catapult

A little boy of six bought a plastic toy catapult from a newsagent for sixpence. Three days later the catapult broke when being used,

[10] *Supra.*
[11] Carriage of Goods by Sea Act, 1924, s. 1.
[12] [1927] 2 K.B. 456.
[13] At p. 462.

and as a result the boy lost his left eye. In *Godley* v. *Perry* [1] the newsagent was held liable to pay the boy £2,500 damages, but the newsagent was awarded an indemnity against his wholesaler, who in turn obtained an indemnity from his supplier, the importer. The manufacturer, in Hongkong, was not joined.

The plaintiff's case was based on section 14 of the Sale of Goods Act, 1893, which imposes two implied conditions in the sale of goods by a dealer. The condition that the goods are reasonably fit for the purpose is implied by section 14 (1) where the seller knows the purpose for which the goods are required and the buyer relies on the seller's skill or judgment. Edmund Davies J. had no difficulty in holding that the child relied on the seller's skill or judgment: he cited Lord Wright's well-known words that, where goods are bought from a retailer, "the reliance will be in general inferred from the fact that a buyer goes to the shop in the confidence that the tradesman has selected his stock with skill and judgment." [2] "Furthermore," continued the judge, "when the customer is, as here, of extremely tender years, an inference of reliance on the retailer's skill and judgment readily and properly arises."

The implied condition that the goods are of merchantable quality under section 14 (2) comes into operation when the goods are sold by description. Counsel for the seller boldly contended that there was no sale by description here, since section 14 (2) applied only to unseen goods, whereas the catapults were displayed in the window and the boy bought one over the counter. In the face of the authorities [3] it is hardly surprising that this argument was rejected, Edmund Davies J. adding: ". . . where . . . a child asks for 'a catapult,' and one is sold to him over the counter, there is no less . . . a sale 'by description' than one where an order is placed on the strength of a catalogue."

The writer of a recent textbook observes that "it is probably true to say that the only cases of sale not by description occur when the buyer in effect says: 'I want that particular thing,' or when no words are spoken at all, as, for example, in the case of a sale in a self-service store." [4] Yet it is suggested that the law would be unduly capricious if, on the facts of this case, the implication of the condition of merchantable quality depended on the boy asking for "a catapult." Had the boy entered the shop, seen the article lying on the counter, picked it up and proffered his sixpence without words, is it possible that the result would have been different? [5] It

[1] [1960] 1 W.L.R. 9; [1960] 1 All E.R. 36 (Q.B.D.)

[2] *Grant* v. *Australian Knitting Mills, Ltd.* [1936] A.C. 85, 99.

[3] Notably Lord Wright in *Grant* v. *Australian Knitting Mills, Ltd.* [1936] A.C. 85, 100, not cited in this case.

[4] P. S. Atiyah, *The Sale of Goods* (1957), p. 68. *Cf.* Stoljar (1952) 15 M.L.R. 425 at p. 442.

[5] The implied condition that the goods are reasonably fit for the purpose under s. 14 (1) does not, it is thought, rest on the use of words. The difference between s. 14 (1) and s. 14 (2) becomes important where the article has more

may well be that it is possible to sell goods by description without words: an article might describe itself by its appearance, just as a label on a tin might describe the contents by a picture.

Having found that both conditions were implied, it was clear on the facts that the catapult was not reasonably fit for use as such, since the judge found that the boy was using it properly when it broke; an agreed report of a consulting chemist showed that the catapult was indifferently moulded from a cheap plastic which was brittle and unsuitable for making toys. Nor was the catapult of merchantable quality.[6]

The seller's claim for indemnity against the wholesaler was based on section 15 (2) (*c*) of the Sale of Goods Act, as was the wholesaler's claim against the importer. Both sales were by sample, and under section 15 (2) (*c*) there is an implied condition of merchantability. But the importer relied on the exception as to defects which would be apparent on reasonable examination of the sample. Counsel for the importer, said Edmund Davies J.,

> " demonstrated that by squeezing together the two prongs of the catapult in the hand they could be fractured, and further suggested that by holding the toy down with one's foot and then pulling on the elastic its safety could be tested and . . . its inherent fragility would thereby inevitably be discovered. True, the potential customer might have done any of these things. He might also, I suppose, have tried biting the catapult, or hitting it with a hammer, or applying a lighted match to ensure its non-inflammability. . . . But . . . none of those tests are called for by a process of ' reasonable examination.' " [7]

The wholesaler and the retailer had in fact examined the samples by pulling back the elastic, though not perhaps to its fullest extent. Such examination, which did not disclose the defect, " was all that could be reasonably expected of any potential customer," and accordingly the defence failed. The case is a useful illustration of the effect of section 15 (2) (*c*) of the Act.

Aubrey L. Diamond.

Restrictive Trade Practices—The Danger Sign

Section 6 of the Restrictive Trade Practices Act, 1956, defines the restrictions which operate to bring an agreement within the scope of Part I of the Act. Sections 20 and 21 require the new court to determine the validity of such restrictions largely on policy grounds

than one use: s. 14 (1) would, it seems, not apply even if the article were not fit for any of its uses, so that the buyer would have to rely on s. 14 (2).

[6] The meaning of " merchantable quality " was pithily summed up by Atkin L.J. in *Niblett* v. *Confectioners' Materials Co., Ltd.* [1921] 3 K.B. 387, 404: " no one who knew the facts would buy it."

[7] *Cf.* Lord Macnaghten in *Drummond & Sons* v. *E. H. Van Ingen & Co.* (1887) 12 App.Cas. 284, 296: " that is not the way in which business is done in this country."

by applying the public interest test. In the cases heard so far, this seems to have been done remarkably well. But the efficacy of the statute and the development of a coherent and workable body of law on this subject will be seriously endangered unless policy is also considered when construing section 6 in determining what restrictions come within the scope of the Act. For it would be quite incongruous if the court should have to make policy evaluations within limits set by a body of arbitrary rules depending only on chance for their relationship to any acceptable policy judgment. Yet precisely this danger is threatened by the case of *Re Blanket Manufacturers' Agreement*.[1]

The case concerned a trade association of blanket manufacturers operating a scheme of horizontal minimum price fixing. There were also various ancillary restrictive provisions. The main price-fixing terms and most of the ancillaries were declared by the Restrictive Practices Court [2] to be contrary to the public interest,[3] and on this aspect of the case there was no appeal. One of the ancillaries, however, was held by that court not to be a restriction within the scope of section 6. This was a resolution of the association (known as the sanctity of contracts resolution) which provided that

> "No manufacturer shall agree to the breaking of any contract by reduction of price or other procedure. Should any attempt be made to break or vary the contract the manufacturer shall refuse to accept cancellation or variation and endeavour to obtain completion of the contract. If this should fail the member must send all correspondence to the secretary without informing the customer that he is doing so. The secretary should then forthwith write the customer to the effect that the correspondence had been handed to him and asking for the customer's explanation for his attempt to break the contract in order that he may advise the manufacturer concerned. If a manufacturer has good reason to agree a request for the cancellation or variation of a contract he shall not so agree until approval is given by the reference committee. . . ."

From this decision the Registrar appealed. Section 6 provides

> ". . . this Part of this Act applies to any agreement . . . under which restrictions are accepted by two or more parties in respect of the following matters, that is to say:—
>
> (*a*) the prices to be charged, quoted or paid for goods supplied, offered or acquired, or for the application of any process of manufacture to goods;

1 L.R. 1 R.P. 271; [1959] 2 All E.R. 630.

2 L.R. 1 R.P. 208; [1959] 2 All E.R. 1.

3 The court reached this conclusion even though the fixed minimum price was found to be reasonable (roughly cost price of the lowest cost producer plus 5 per cent.), and even though the members usually sold at a competitive price above the fixed minimum.

(*b*) the terms or conditions on or subject to which goods are to be supplied or acquired or any such process is to be applied to goods;
(*c*) the quantities or descriptions of goods to be produced, supplied or acquired; . . ."

Thus the question for the Court of Appeal was whether or not those words should be held to include the sanctity of contracts resolution. Clearly it was arguable both ways. The court regarded it as " . . . not an easy question," but " very largely one of first impression." It was held that the language of paragraphs (*a*) (*b*) and (*c*) " is, on the face of it, directed to the case of a manufacturer about to enter into a trading contract." It did not apply to variations of an existing contract. Accordingly the resolution was held to be outside the scope of the section. Thus the court avoided any rational analysis of the problem by sheltering behind the façade of literal construction.

In the present case, the resolution was ancillary to the restrictions constituting the horizontal price fixing. Thus it may be that when those restrictions became illegal the sanctity of contracts resolution lost some of its significance. But however innocuous the decision may have been on the particular case it is a most unfortunate precedent. It might be argued that to insist upon manufacturers abiding by their contract prices is beneficial in that once the regular contract prices of each manufacturer have been published, then this information forms the basic knowledge essential to the intelligent operation of a free competitive market.[4] If a manufacturer could surreptitiously vary the price on contracts previously made on terms which had become known to the trade, then this would facilitate unfair methods of competition tantamount to deceit. But to this argument at least two answers are available.[5] One is that if market information is the objective then it could just as readily be achieved by less restrictive provisions, *e.g.*, by requiring that each manufacturer should report any changes in the price or other conditions of his existing contracts and that reports of such changes should be published by the association.[6] The other is that if an intelligent free market is really desired then the information should be published vertically as well as horizontally. It is submitted that there is no valid argument at all which could be used to justify the exclusion of the sanctity of contracts resolution from the scope of section 6.[7] On the other

[4] *Cf. Chicago Board of Trade* v. *United States* (1918) 246 U.S. 231; 38 S.Ct. 242.
[5] *Cf. Maple Flooring Manufacturers' Association* v. *United States* (1925) 268 U.S. 563; 45 S.Ct. 578, and *Sugar Institute* v. *United States* (1936) 297 U.S. 553; 56 S.Ct. 629.
[6] Preferably without identifying the particular manufacturer or purchaser.
[7] It was argued by counsel, at p. 232, before the Restrictive Practices Court, that the resolution was necessary to establish uniformity of practice and thereby protect manufacturers against the risk of dishonoured contracts. On a falling

hand, there are substantial arguments for its inclusion. Firstly, the absence of restraint upon the power to vary an existing contract is surely just as necessary to the functioning of a free competitive market as the freedom to make an original. Secondly, even where there is no express agreement on original prices, a restriction of this type would tend to facilitate the advent of horizontal price fixing by the processes of conscious parallelism and price leadership.[8] The court should at least have allowed the opportunity of applying the public interest test.[9]

Literal construction of ambiguous statutes is suspicious enough in any event. But with this Act in particular, it cannot be satisfactory that the court should choose to ignore the policy issues and to construe the statute by a process hardly more discriminating than the toss of a coin.

Terence G. Ison.

market a purchaser might be anxious to avoid a contract previously made at a higher price, thereby placing the manufacturer in financial difficulty. In these circumstances intervention by the association might well force the purchaser to honour his contract. But if this argument has any substance at all, then it relates only to this case. It is not a general argument applicable to all sanctity of contract restrictions. Thus it should be used only by way of justification under s. 21. It is no reason why such restrictions should be excluded from s. 6.

[8] It was not without reason that in the *Sugar Institute* case, the decree allowed publicity to be given to transactions, but prohibited any requirement that members should adhere to prices announced in advance.

[9] The case might be explained on the discomforting theory that whether the court takes a literal or a policy approach (whether *sub nom.* "the mischief rule" or otherwise) depends largely on the fortuitous circumstance of how familiar the Bench and Bar happen to be with the subject-matter of the legislation.

REVIEWS

Anson's Law of Contract. By A. G. Guest, M.A., Fellow of University College, Oxford. Twenty-first edition. [Oxford: Clarendon Press. 1959. lviii and 607 pp. £2 10s. net.]

The first edition of Anson's *Law of Contract* appeared in 1879. For well over half a century it must have been the medium through which the majority of students were introduced to the subject. Sir William Anson's treatment combined accuracy and lucidity to a remarkable degree. In recent years, however, Anson, like an ageing star, has been challenged and overtaken by younger rivals. This was due partly, no doubt, to the absence of a thorough revision since 1945, but also to the fact that, as Mr. Guest points out in his introduction to this edition, "However good a book may be, it slowly loses what life and originality it once possessed by reason of successive accretions." This is particularly the case, of course, where the process of revision has not been carried out by the author, since editors must necessarily feel a certain reverence for his views and arrangement, and even indeed for his *ipsissima verba*. The last edition by Sir William Anson was in 1912. In these circumstances it would not have been surprising if Mr. Guest had been content to acquiesce in the demise of Anson, but instead he has chosen the path of "complete revision." It may perhaps be doubted whether such an attempt, however valiant, is worth while. Since 1879 or even since 1912, the changes in the substantive law of contract have, despite the dead hand of *stare decisis*, been considerable, but more significantly the social and economic background of the law has been totally altered. Mr. Guest, of course, is not unaware of these changes, but the legacy of twenty previous editions is often a grievous handicap in grappling with them. This is immediately apparent in Chapter 1 where an attempt is made to integrate with Anson's original discussion of the nature of contract such typically twentieth-century ideas as Dean Pound's theory of "injurious reliance" and Professor Hart's analysis of defeasible concepts. The result is confusion. Thus on p. 4 we are told "a promise, in fact, connotes an agreement between the parties to it" but no attempt is made to reconcile this with the statement on p. 7 that "promise . . . is more suggestive of an objective attitude than agreement." It would seem clear that in non-legal usage "promise" and "agreement" are not identical. If some special legal meaning is intended, this should be made clear. Similarly the discussion of contract should make it clear whether what is attempted is a jurisprudential definition of "contract" which is equally true of all systems or a discussion of the meaning of "contract" in English law. If the two are merged the discussion may become so general as to be of little practical value, whereas it is submitted that it is of considerable practical importance to define the underlying ideas behind English contract law. This is not to claim that English law can be deduced *a priori* from a few fundamental postulates but it is clear for instance that Lord Denning's approach to contractual problems is motivated by a strong belief in the morally binding force of promises which is likely to, and does, lead him to different conclusions from other judges whose inarticulate premise is the commercial bargain. Mr. Guest leaves such questions unresolved.

Outwardly the work of revision has been attractively done. A new page size and type have been adopted and the book is pleasant to handle and read. It is not easy to estimate the effect of these changes on the size of the work but since it is now 150 pages longer it is clear that Mr. Guest has added much new material. This might perhaps have been compensated for by the

deletion of the chapter on Quasi-Contract, the inclusion of which can only be justified by the accidents of history. The disappearance of references from the table of cases will be regretted by many users. Technically there are very few errors but the following were noticed: "offeree" on p. 59, line 15, should be "offeror"; "to plea" on p. 114, penultimate line of third paragraph, should be "to plead"; Mellish L.J.'s name is incorrectly spelt on p. 267, note 1; the last sentence in the third paragraph on p. 270 is ungrammatical; on p. 349, note 4 "yer" should be "per"; on p. 350 the article cited from 15 Harvard L.R. is by Williston and not Corbin, and on p. 356 the reference should now be to Gutteridge and Megrah, *The Law of Bankers' Commercial Credits* (2nd edition).

There is obvious scope for variance of opinion as to the precise content of a student's work on contract but to this reviewer at least the number of omissions of significant references seems in the total rather considerable. One of Mr. Guest's stated objectives is to increase the number of references to periodical literature, which in previous editions had been minimal, but the selection remains eclectic. The following would seem to be worthy of consideration for future editions: on damages, Mr. Mulligan's articles in 71 S.A.L.J. 44; 72 S.A.L.J. 152, 362; 73 S.A.L.J. 27, 261, 423; 74 S.A.L.J. 61, 296; 75 S.A.L.J. 160; and those of Professor Marshall in 34 Can.B.R. 969 and of Mr. Waters in 36 Can.B.R. 360; Mr. Unger's article on the problem of the fundamental term in 4 Business L.R. 30; Mr. Treitel's note on exemption clauses and third parties in 18 M.L.R. 172; the article of Professor Kahn on offer and acceptance in 72 S.A.L.J. 246. References might be given to the criticisms of *Upton-on-Severn R.D.C.* v. *Powell* [1942] 1 All E.R. 220, mentioned at p. 30.

No reference is made to any of the considerable literature developing around *British Transport Commission* v. *Gourley* and the seventh report of the Law Reform Committee thereon (Cmnd. 501) but this is less surprising than the unaccountable omission of any reference to the case itself. There are a number of omissions in the discussion of offer and acceptance: *Quenerdnaine* v. *Cole* might be cited on p. 55 on contracts by telegram; the decision of the High Court of Australia in *Tallerman & Co. Pty., Ltd.* v. *Nathan's Merchandise (Vict.) Pty., Ltd.* (1957) 31 A.L.J. 176 should be mentioned on the basis of the rules as to acceptance through the post, and *Dick* v. *U.S.* (1949) 82 F.Supp. 326 and *Rhode Island Tool Co.* v. *U.S.* (1955) 128 F.Supp. 417 on purported revocation of a posted acceptance. In the discussion of the *Strathcona* case on pp. 343–347 the judgment of Scrutton L.J. in *Barker* v. *Stickney* [1919] 1 K.B. 121 should be mentioned. Reference might also be made to the articles by Professor Chafee in 41 Harv.L.R. 945 and Professor Wade in 44 L.Q.R. 51 and to the interesting suggestion by Professor Lawson in his *Introduction to Property* (pp. 72–73) that bailments of chattels may create interests analogous to estates in land. It does seem that if the *Strathcona* case was rightly decided it must be by reason of developments in the law of property rather than of contract—see too Holdsworth in 49 L.Q.R. 576 at 579. On pp. 353–354 Mr. Guest suggests that a major objection to the wide application of the trust to avoid the doctrine of privity of contract was the irrevocability of the trust. But it has been suggested that such a trust might be revoked by the original contracting parties—see *Hill* v. *Gomme* (1839) 5 My. & Cr. 250 and Fullagar J. in *Wilson* v. *Darling Island Stevedoring and Lighterage Co., Ltd.* (1956) 95 C.L.R. 43 at 67. It is not clear whether Mr. Guest had access to *Goodyear Tyre & Rubber Co.* v. *Lancashire Batteries* [1958] 1 W.L.R. 857, which indicates a substantially different approach to section 25 of the Restrictive Trade Practices Act, 1956, from that adopted by Harman J. in *County Laboratories* v. *Mindel* [1957] Ch. 295. The work is dated January 1959 but there seem to be other omissions of 1958 authorities. At p. 418 a cross-reference to the effect of the Law Reform (Frustrated Contracts) Act, 1943, might be given in relation to the discussion of *Cutter* v. *Powell*; the important case of *St. John Shipping*

Corporation v. *Joseph Rank, Ltd.* [1957] 1 Q.B. 267 might be thought worthy of more extended mention in relation to illegal performance and statutory prohibition; *Gillman* v. *Gillman* (1946) 174 L.T. 272 might be mentioned in the discussion of *non est factum*; on p. 26 *May and Butcher* v. *R.* [1934] 2 K.B. 17n. might be mentioned in relation to certainty of terms and the implication of a reasonable price.

A more serious criticism of this work is the unduly dogmatic attitude taken by Mr. Guest on many doubtful points. While one naturally welcomes an author's statement of his own views on controversial matters, a work for students should surely indicate the existence of other views. Thus on p. 127 *Rowland* v. *Divall* is cited for the proposition "that no exemption clause could exclude the obligation of the seller to convey a good title to the goods sold." This proposition is no doubt tenable but it may be doubted whether *Rowland* v. *Divall* establishes it and the contrary view has received a good deal of academic support—see Mr. Hudson in 20 M.L.R. 236—and such an exclusion was held possible in *Warmings Used Cars, Ltd.* v. *Tucker* (1956) S.A.S.R. 249 on the interpretation of the South Australian counterpart of the Sale of Goods Act. The statement at p. 222 that a wilful misrepresentation of law will not give rise to an action of deceit ignores the possibility that the statement of law may be treated as a statement of the representor's opinion as to the state of the law which may in turn be regarded as a factual statement about his state of mind. This view has a good deal of support including that of the editor of the 20th edition—see Mr. Hudson in 1958 S.L.T. 16.

The analysis of section 56 (1) of the Law of Property Act, 1925, at pp. 357–359 would seem to underestimate the force of Lord Denning's views. Lord Denning is accused of a "bold disregard of the traditional canons of statutory interpretation." Such a charge would carry greater conviction if the particular canons which are alleged to be disregarded were enumerated. While it is too early to be dogmatic on this subject, it would seem that at least one familiar canon, that of literal interpretation, can be deployed on the other side.

In the discussion of the distinction between an offer and an invitation to treat, mention should be made of the criticisms of the *Boots* case by Mr. Unger in 16 M.L.R. 369 and Professor Kahn in 72 S.A.L.J. 246 and reference made to the contrary decision in *Lasky* v. *Economy Grocery Stores*, 319 Mass. 224. Instead, *Denton* v. *Great Northern Ry.* is cited alongside the *Boots* case and *Grainger and Son* v. *Gough* without any indication being given of the difficulties of reconciling these cases. The discussion of *Tinn* v. *Hoffmann* at p. 37 gives no hint of possible arguments that the true *ratio* of the decision of the Exchequer Chamber was that the cross-offers were not identical rather than that identical cross-offers cannot constitute a contract. One would have expected some indication of the view that the requirement of intent to create legal relations was a fifth wheel to the coach of consideration—see Williston, Tuck, 21 Can.B.R. 123; Unger 19 M.L.R. 96. It may be thought questionable how far the remarks of Atkin L.J. in *Balfour* v. *Balfour*, which are quoted, represent the *ratio* of the Court of Appeal in that case.

On p. 484 Mr. Guest says: "It is generally agreed that, in order that a contract may be specifically enforced, there must be mutuality between the parties." It is not clear in what Mr. Guest's criterion of general agreement consists. Ames's classic article is dismissed with a cursory "*cf.*," and the contrary views of Ashburner, pp. 404–405, Maitland, p. 311, Hanbury, p. 523, and Salmond and Williams, p. 599, are ignored. In these circumstances it is not to be expected that even the powerful voices of Harlan Fiske Stone in 16 Columbia L.R. 443 and Walter Wheeler Cook in 36 Yale L.J. 897 would carry across the Atlantic. *Epsten* v. *Gluckin* (1922) 233 N.Y. 490 and *O'Regan* v. *White* [1919] 2 I.R. 392 are no doubt relegated to the category of little local differences. The rule that specific performance of a gratuitous promise under seal will not be granted would seem to rest rather on the doctrine that equity will not assist a volunteer.

It is puzzling, too, to find the rule in *Flight* v. *Booth* (1834) 1 Bing.N.C. 370 in the discussion on contracts *uberrimae fidei* (pp. 214–215). The vendor of land is not under a duty to disclose defects in title. The vital question is what the vendor has contracted to do. He may have excluded his liability to convey a good title but if he has not, then he will be in breach if he cannot show a good title though this is not necessarily a bar to specific performance. See Megarry and Wade, *Real Property*, 2nd edition, p. 583, especially note 73.

The treatment of "promissory estoppel" is unsatisfactory. It is doubtful whether all the cases cited on p. 101, note 5, as examples of *High Trees* are properly so classified. In some at least consideration could be found. But, more important, the problems of reconciling *High Trees* with *Jorden* v. *Money* are glossed over. It should be made clear that *Jorden* v. *Money* laid down a rule which was as much equity as law—see also *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873) L.R. 6 H.L. 352. *Hughes* v. *Metropolitan Ry.* is itself consistent with *Jorden* v. *Money* but it may be doubted whether it provides justification for the wholesale disregard of *Jorden* v. *Money* which is now fashionable. Certainly, rightly or wrongly, the dicta in *High Trees* go further and a clear discussion of how much further was needed.

Mr. Guest has inherited one or two unfortunate legacies from previous editors. It may be doubted whether the device of solving the problems of *Bainbridge* v. *Firmstone* (1838) 8 A. & E. 743 and *De la Bere* v. *Pearson* [1908] 1 K.B. 280, by labelling them cases where the court refused to inquire into adequacy, merits repetition. The problem is surely to see how the consideration, however small, was given in return for the promise. It is fanciful to analyse a gratuitous bailment by saying that the bailee buys the bailor's promise to lend the chattel by his promise to return it. Indeed, if this were the correct analysis, it would seem that a gratuitous and executory promise to lend would be enforceable.

At pp. 81–82 we are told that an executed consideration may exist where the offeror has done, in making his offer, all that he was bound to do. An example given is that of "a man who offers his labour or goods under such circumstances that he obviously expects to be paid for them; the contract arises when the labour or goods are accepted by the person to whom they are offered, and he by his acceptance becomes bound to pay a reasonable price for them." It would seem, however, that if the alleged offeror has in fact done all that he would be bound to do, a subsequent acceptance would not constitute a contract unless the alleged offeree had a genuine chance to reject: see, for example, *Forman* v. *Liddlesdale* [1900] A.C. 190. Further, in the case put of the merchant selling wine, the merchant's obligation is not merely to transfer possession but to transfer title and possibly to perform undertakings as to quality.

There are a number of statements which are calculated to mislead students. Thus on p. 9 *Sinclair* v. *Brougham* is cited for the proposition that in the case of an *ultra vires* contract made by a corporate body any money or other property transferred cannot be recovered. But, whatever else is unclear about that difficult case, it is clear that the depositors recovered some at least of the money they transferred under the *ultra vires* contracts of loan. There are two misleading statements in the discussion of warranties *ex post facto* on pp. 114–117. At the foot of p. 115 we read "if the contract is severable, that is to say, if delivery of the goods is to be made by instalments." A student could hardly be blamed for reading this as a definition of a severable contract. On p. 116 *Leaf* v. *International Galleries* is explained on the basis that the right to reject was lost on acceptance; but the Court of Appeal avoided this question and relied upon the additional element of lapse of time. The discussion of *Adler* v. *Dickson* on p. 161 gives no hint of the differences of opinion amongst the members of the Court of Appeal, nor does it bring out the vital point that they were agreed that no attempt was made to exclude the liability of the master and boatswain in the contract between the company and

the passenger. On p. 381 it would be more accurate to describe a cheque as a direction to a banker rather than a request: see sections 3 and 73 of the Bills of Exchange Act, 1882. A student might be puzzled by finding the rules as to the formalities of corporate contracts included in a section entitled capacity, though this is a popular arrangement. The 8th Report of the Law Reform Committee (Cmnd. 622) on this subject is omitted. At p. 354 in a discussion of exceptions to the doctrine of privity of contract Mr. Guest writes: "Contracts of insurance are often made in favour of third parties and the legislature has intervened to ensure that these may be enforced by them.' Surely this statement needs qualification. Legislative intervention in this field has been partial and not complete. The statement on p. 361, second paragraph ("as we have seen in connexion with section 56 (1) of the Law of Property Act, 1925, it is often the implied beneficiary who is most in need of the assistance of the statute") is obscure.

Mr. Guest has invented a new exception to privity of contract entitled the "floating warranty" based on *Andrews* v. *Hopkinson* and *Shanklin Pier, Ltd.* v. *Detel Products, Ltd.* The suggestion is that in *Andrews* v. *Hopkinson* the plaintiff (hire-purchaser) has an action against the defendant dealer because of the existence of a contract between the dealer and the finance company (although there is no contract between the plaintiff and the defendant). This is difficult to accept. No explanation is given of what term in a contract between the dealer and the finance company could possibly be for the benefit of the customer nor why he should be entitled to enforce such a term if it existed. In fact it is clear that in that case the customer was allowed to enforce the promise made by the dealer to him as to the quality of the car and that McNair J. found consideration for this promise in the customer's entry into a contract with the finance company. In short there was a contract between plaintiff and defendant and no question of privity of contract arose.

It would be pleasant to be able to conclude that these criticisms amounted only to minor blemishes. But such a judgment would not give an accurate picture of this work, which contains too many errors, omissions and unbalanced statements to be a satisfactory guide for students. It must be regretfully concluded that this attempt to restore Anson to its former primacy has not been successful.

M. P. Furmston.

Administrative Law Treatise. By Kenneth Culp Davis, Professor of Law in the University of Minnesota. [St. Paul, Minnesota: West Publishing Co. 1958. 4 volumes.]

No review can do real justice to the immense scholarship and industry that lie behind these four volumes. On many problems of administrative law, English lawyers are still groping for solutions with little to guide them from precedent or experience. American administrative law, incomplete, imperfect and self-contradictory as it often is, and as Professor Davis would agree, does contain a wealth of intellectual stimulant for anyone concerned with the growth of administrative law in England. This treatise may not be found on the shelves of many English lawyers, but those who have opportunities for moulding our law should certainly have access to it.

English writers are accustomed to criticise judgments with restraint or at least a show of restraint. Professor Davis has no compunction at all about attacking the opinions of the Supreme Court in strong terms whenever he feels the need to do so. In his conclusions on the subject of judicial relief normally being withheld until administrative remedies have been exhausted, he says: "No opinion of the Supreme Court explains the contrariety of holdings; instead, the opinions are characteristically filled with misleading statements" (para. 20.10). This is one example of the spirited style that marks these volumes.

Professor Davis is engaged in this *Treatise* in the task of systematically expounding the law, where this can be done, and explaining the law's shortcomings where systematic exposition is impossible. "When search for established principle turns out to be futile," he says in the Preface, "the search must be for sound principle."

Keen emphasis is placed on the need to dismantle "misleading doctrine," for example, that the legislative powers of Congress can only be delegated under the limitation of a prescribed standard. As the author explains at length, mostly the courts pay only lip-service to this false doctrine, but harm results because the courts do sometimes take it seriously. As another writer (Professor Schwartz) has put it, enabling laws are now generally upheld in the United States even though the only standard which the court can find is so broad as to be almost illusory. With the publication of this *Treatise*, there will be little excuse for a court not recognising "misleading doctrine."

In his customary forthright way, Professor Davis criticises the Supreme Court's language on standards in the *Schechter* case, which is one of the only two cases in American history where delegation to a governmental authority was held invalid. A three-judge district court followed the opinions of the Supreme Court to the letter and because the lower court did take literally what the Supreme Court had said, the Supreme Court reversed it.

On many matters, of course, Professor Davis expresses the same views as he did in his one-volume work *Administrative Law*, published in 1951. Time may occasionally mute criticism, as in his discussion of closing agreements made by the Internal Revenue Service. These agreements whereby a taxpayer can learn his tax liability before taking a certain course of action, are not subject to judicial review. They give the taxpayer, therefore, only limited protection. Writing in 1949 in the *Harvard Law Review*, Professor Davis urged that a taxpayer should be enabled to remove doubts about the validity of administrative interpretations by securing judicial review. Discussion on this is now relegated to a footnote and criticism of the existing position barely visible (para. 4.10, note 23).

It is interesting to compare binding declaratory rulings made by administrative authorities in the United States with procedures in this country, such as provisional liquor licensing, which might usefully be extended to other fields and perhaps replace the extra-judicial practice of giving unofficial interpretations and concessions. A binding ruling made by an administrative agency could operate as an estoppel on the lines advocated by Lord Denning in *Falmouth Boat Construction Co.* v. *Howell* [1950] 2 K.B. 16, 25, but rejected by the House of Lords [1951] A.C. 837. Unfortunately, American experience is limited because it is entirely a matter for an agency's discretion whether to issue binding rulings and some, like the Federal Trade Commission, have announced a blanket refusal to issue declaratory orders at all.

The safeguards used in the United States to ensure against abuse of delegated legislation is of particular interest to English readers. Legislative control is better developed here than in the United States, but we probably have something to learn from American experience of antecedent publicity, the need for which was curiously abolished here by the Statutory Instruments Act, 1946. Public hearings, too, can sometimes be useful to make sure that all interests affected by rules to be promulgated do have their say. However, nobody in England would want the formal trial methods that have to be brought into play before regulations are made under the American Food, Drug and Cosmetic Act, 1938. The agency concerned has to take "evidence" from "witnesses" who "testify" on such questions as to whether "golden" should be permitted as a synonym for "yellow" in the labelling of canned corn, and whether pear halves should have a minimum weight of 4/5ths or 3/5ths oz., and so on. Any interested person is permitted to cross-examine witnesses. Informal public meetings at which the views of interested persons

can be put forward are one thing but trial hearings are clearly liable to become chaotic and unwieldy.

There are many interesting comparisons to be drawn between American and English practice with regard to an individual's right to a hearing when he comes up against the Administration. It is only recently here, by Home Office ruling, that when a deportation order is made otherwise than on a court's recommendation, the alien can seek a hearing by a metropolitan magistrate at Bow Street. As Professor de Smith has said, the state of our law suffers by comparison with that of the United States (*Judicial Review of Administrative Action*, p. 118). Again, in a case in the United States exactly similar to the *Parker* case, the court took the more liberal view that a cab driver is entitled to a hearing before his licence is revoked and his living thereby destroyed. Recent cases in lower federal courts hold that passports may not be denied without opportunity of a hearing. However, in some types of cases, both countries suffer individuals to lose rights by administrative action without a hearing of any sort. This is done by the sleight of hand of calling such rights "privileges" (para. 7.11). In our country, the Privy Council decision in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66 juts out like a sore thumb. The picture is more confused in the United States—the Federal courts and the courts of California and Massachusetts reject the privilege doctrine in licensing, but generally, says Professor Davis, the state courts are "befuddled by the privilege doctrine in allowing the death sentence to be imposed upon a lawful business without giving the owner of the business a chance to be heard" (para. 7.19).

In several branches of the law dealt with in the *Treatise*, no amount of collation and distinguishing of cases can make possible a clear statement of established principles. In these circumstances, Professor Davis has sought to construct sets of proposals to give coherence to the law, drawing on "whatever is of value in judicial opinions and other legal materials." The usefulness of this exercise can be gauged by reference to Chapter 21 on "Ripeness for Review."

The extent to which the prerogative orders are satisfactory as methods of reviewing administrative action has been the source of controversy in both the United States and England. Certiorari as a means of reviewing administrative action is rare indeed now in the federal courts; it has been replaced by the injunction and the declaratory judgment, both regarded by Professor Davis as satisfactory. In England, the prerogative orders have not been static in their application and many observers feel that now certiorari is clearly available to remedy error of law on the record, it has established its usefulness in the modern world and should not be jettisoned. On the other hand, the declaratory judgment has advanced as an up-to-date remedy more suited to present-day needs, with Lord Denning as its chief sponsor. There is uncertainty about the boundaries of the various remedies in English law; this uncertainty and the plurality of remedies is echoed in the United States state courts. Professor Davis comments that "an imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies" (para. 24.01). He regards the complication so great that he advocates legislation to provide for a single form of proceeding for review of administrative action, whether the action is legislative, judicial, or executive. He espoused the same cause in his 1951 volume, and its non-acceptance is no indication that it lacks merit.

Both by certiorari and declaration, an English court is prepared to review an administrative tribunal's decision for error of law, but not for errors of fact. In the United States, on the other hand, the courts will inquire into the facts to see whether there was "substantial evidence" to support the finding. Supporters of this judicial attitude point out that this does not mean that the court's judgment is substituted for that of the tribunal's. However, as Professor Davis says, "in many important cases the Supreme Court has

violated its own rule and has substituted judgment for that of the lower court" (para. 29.11). The thin end of the wedge seems to have made its appearance in England—if there is "no evidence" to support a tribunal's decision, that is equivalent to an error of law. This seems but a short step to the American position with the dangers that Professor Davis has shown.

Gordon Borrie.

Cases on Equity and Trusts by G. W. Keeton, m.a., ll.d. [London: Sir Isaac Pitman and Sons, Ltd. 1959. xxv and 285 pp. 50s.]

Cases on Trusts selected and edited by H. A. J. Ford, s.j.d. (Harvard), ll.m. (Melbourne). [Law Book Company of Australasia Pty., Ltd., and distributed in England by Sweet and Maxwell, Ltd. 1959. xvi and 794 pp. 95s.]

As Professor Keeton points out in his Preface, the prime aim of his book is to constitute a companion volume to his textbooks, *Introduction to Equity* and *The Law of Trusts*. One reads with regret that circumstances combined to prevent the earlier appearance of the casebook with the textbooks, for it nicely rounds off these works and at the same time will be (as the author very justifiably hopes) of value to students using other textbooks.

Neither this work, nor that of Dr. Ford, who is Reader in Law at the University of Melbourne, resembles Nathan's *Equity Through the Cases*. Explanatory matter is cut down to a minimum, although, where it is present, both authors acquit themselves with clarity and succinctness. Neither author has elected to insert any excerpts from leading periodical literature or to present a sustained bibliography. Dr. Ford, however, has inserted some problems for students to work out, since his book is intended to be a manual of instruction comparable to Scott's *Cases on Trusts* or Smith and Thomas's *A Casebook on Contract*. Professor Keeton's book, however, is of the order of Cheshire and Fifoot's *Cases on the Law of Contract*.

Whereas *Nathan* is confined to a broad statement of the law of trusts accompanied by some materials on the nature of an equitable interest, clogging the equity of redemption, restrictive covenants and rights of third parties under contract, Professor Keeton has purposefully covered a much wider field of equity. Part I of the book contains forty-two "cornerstones" covering the general principles, such as *Penn* v. *Lord Baltimore* (1750) 1 Ves.Sen. 444; *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9; *Hurst* v. *Picture Theatres* [1915] 1 K.B. 1 (including, one is pleased to find, the dissenting judgment of Phillimore L.J., but not, alas, any note on the intricacies of the "matrimonial home" licence cases); *Berry* v. *Berry* [1929] 2 K.B. 316 and the *High Trees Case* [1947] K.B. 130. *Tulk* v. *Moxhay* (1848) 2 Ph. 774 stands alone in its glory on restrictive covenants and *Pledge* v. *White* [1896] A.C. 187 on mortgages. *Inter alia*, there are cases on injunctions; assignments have been accorded generous treatment, so that no student need now be heard to say he has not read *Dearle* v. *Hall* (1823) 3 Russ. 1. One might plead for the inclusion in another edition of *Hughes* v. *Pump House Hotel* [1902] 2 K.B. 190 and *Durham Bros.* v. *Robertson* [1898] 1 Q.B. 765 in place of *Tancred* v. *Delagoa Bay* (1889) 23 Q.B.D. 239. The expected cases appear to illustrate the various aspects of the equitable doctrines of conversion, election, satisfaction, performance and ademption. Fraud in equity, rectification, rescission and equitable execution are also dealt with. One is especially glad to see *Elliott & H. Elliott (Builders), Ltd.* v. *Pierson* [1948] Ch. 452 and the *Slack Case* [1924] A.C. 851 under specific performance and injunctions, but sorry to find nothing on part performance, a frequent stumbling-block for the student.

Pages 141–284 are devoted entirely to fifty-one cases on the law of trusts. Such overlap as there is with *Nathan* consists entirely of leading cases. The selection of cases should, like those in Part I, please all teachers and students, particularly those with a taste for teaching and learning from a book with historical bias. This is not to say modern authority is lacking; it is not, as witness *Re Wale* [1956] 1 W.L.R. 1346 and *Shephard* v. *Cartwright* [1955] A.C. 431 and the assimilable presentation of the *Diplock* legends. It is a pity that *Chapman* v. *Chapman* [1954] A.C. 429 could not be followed by the text of the Variation of Trusts Act, 1958.

Dr. Ford's *opus* is on a more monumental scale: just over two hundred cases appear, some one hundred and eighty set out *in extenso,* the remainder being digested. There is a preponderance of leading English cases, and there are several Australian and New Zealand authorities, two from Massachusetts and one Malayan case. The overlap with *Nathan* consists of some forty cases. Dr. Ford has collected cases covering the broad principles of the subject; he has left out, very wisely, capacity to be a trustee, the appointment of new trustees and functions of public trustees, since they are the subject of local legislation; he has also kept down the powers of trustees to a bare minimum for similar reasons and on the assumption that individual lecturers will fill in the details where necessary. Various provisions of English and other legislation are set out in the appropriate places, partly in order to stimulate a comparative law approach to the subject. It is unfortunate that the author felt that limitation of space and his view, fostered perhaps in America, that the constructive trust is a remedial device rather than a medium of disposition should have compelled him to restrict himself to four cases in fifteen pages on that topic. An English teacher who prescribed this work (and it is to be hoped that it will be used in England, for, if expensive, it is an excellent book) would certainly consider this Cinderella-like treatment inadequate. *Bannister* v. *Bannister* [1948] 2 All E.R. 133 and *Re Biss* [1903] 2 Ch. 40 one misses in particular.

It is very difficult, if not unfair, to criticise the selection of cases of an author of a large-scale teaching casebook. Inevitably considerations of space and personal predilection enter into the matter and much soul searching is necessitated in order to decide what to omit. One would have liked to see something—assuming that space could be found by judicious pruning—on the distinction between trusteeship and the office of personal representative, with reference to *Attenborough* v. *Solomon* [1913] A.C. 76. *Re Schebsman* [1944] Ch. 83 might accompany the *Vandepitte Case* [1933] A.C. 70. The section on charities could be enriched by the inclusion of *Re Coxen* [1948] Ch. 747; *Re Ulverstone & District New Hospital Building Trust* [1956] Ch. 622; the Charitable Trusts (Validation) Act, 1954, and the Recreational Charities Act, 1958. Some reference might also be made to the *Gillingham Bus Disaster Fund Case* [1959] Ch. 62; [1958] 2 All E.R. 749 (though possibly details of these last two items arrived too late for inclusion); *Re Gwyon* [1930] 1 Ch. 255; and does not *Re Wokingham Fire Brigade Trusts* [1951] Ch. 373 deserve a place as a "problem" case? The speech of Viscount Simonds in *Baddeley* v. *I. R. C.* [1955] A.C. 572 on what is a section of the community is worth fitting in; *Re Colin Cooper* [1939] Ch. 580 and *Re Young* [1951] Ch. 344 merit inclusion among the secret trusts cases and *Buttle* v. *Saunders* [1950] 2 All E.R. 193 among those illustrating the trustee's duty of loyalty. Since precatory trusts will last as long as the maker of the home-made will, the reviewer would put in also a plea for expanded treatment of this topic. Mention might also be made of *Tiger* v. *Barclays Bank* [1952] 1 All E.R. 85; *Klug* v. *Klug* [1918] 2 Ch. 67 and *Hawkesley* v. *May* [1955] 3 All E.R. 353. All this, however, amounts to an intimation as to how the reviewer would have personally supplemented the contents of the book had he been using it for teaching purposes in England, not to a charge of omission on the part of Dr. Ford. The care and skill with which he has obviously compiled the book are admirable.

Both volumes are well got up and free of misprints (there is one on p. 541 of *Ford*) and are adequately indexed. *Ford* suffers from the drawback that the case index contains no references, so that one has to look in the text to ascertain whether a case is English or Australian; a separate index to statutes, in the traditional manner, would also be an improvement on the list of statutes contained in the index at the end of the book. And references to the English Reports, where apposite, would assist in both books.

Both authors and their publishers are to be warmly congratulated on their productions.

P. R. H. Webb.

The Law and Practice of Registered Conveyancing. By Sir George H. Curtis, c.b., Chief Land Registrar of H.M. Land Registry, of Gray's Inn, Barrister-at-Law, and Theodore B. F. Ruoff, Senior Registrar of H.M. Land Registry, Solicitor of the Supreme Court of Judicature. [London: Stevens & Sons, Ltd. 1958. lxiii and 1107 pp. and Index. £6 6s. net.]

Concise Land Registration Practice. By Theodore B. F. Ruoff, Senior Registrar of H.M. Land Registry, Solicitor of the Supreme Court of Judicature. [London: Sweet & Maxwell, Ltd. 1959. xvi and 265 pp. and Index. 37s. 6d. net.]

In June last the Attorney-General told the House of Commons that approximately one-quarter of all conveyancing transactions are now governed by the Land Registration Act, 1925. This fraction must steadily grow. Compulsory and voluntary first registration continue apace (see the Chief Land Registrar's Report, 1959, pp. 2–4). Manchester is expected to become a compulsory area shortly, and other conurbations will probably follow; indeed, the rate may well be dictated only by the Registry's digestive ability. Registered conveyancing must soon become the dominant and eventually the universal system in England. We are in the midst of a revolution in conveyancing practice and need all possible guidance to the coming régime. Nothing could therefore be more welcome and valuable than this comprehensive and authoritative study of the law and practice by the Chief Land Registrar and one of his Senior Registrars; the latter, who is already known for his contributions to the existing literature on the subject, has also produced a very useful simpler and shorter guide to practice.

Curtis and Ruoff's 899 pages of text are divided into seven parts. Part 1 (pp. 3–72) describes the system and the register; Part 2 (pp. 73–162) discusses the general law—the effect of registration on the legal estate, classes of title, overriding and minor interests and Part 3 (pp. 163–320) first registration and conversion of titles. The heart of the book, Part 4 (pp. 321–720), is devoted to all types of dealing, from sales to smallholdings. Parts 5, 6 and 7, comprising respectively pp. 723–824, pp. 825–874 and 875–899, are entitled: Notices, Cautions, Inhibitions and Restrictions; Rectification of the Register, Indemnity and Judicial Proceeding; and Miscellaneous. Appendices contain the Land Registration Act, Rules, fee orders and solicitors' remuneration orders. It is particularly useful to have text, Act and Rules within the same cover. The length of the book has, however, been somewhat increased by the authors' decision to make each chapter complete in itself at the cost of repetition and to eschew cross-reference (Preface, p. v). The proof of this unusual policy of course lies in the reactions of practitioners, for whom the book is principally intended. For the different purpose of reviewing it has been found necessary to try to check all the index references to particular points, and here cross-references would have been helpful. Perhaps more could be given in a future edition without disturbing the main arrangement?

This book amply demonstrates the authors' complete mastery of their subject, and the care they have taken to make their account comprehensive. Both usual and rare transactions are discussed fully. It will be surprising if any practitioner fails to find invaluable information and guidance whatever his problem, whether it relates to the general law affecting registered land, or some comparatively obscure detail of Registry practice. Notable examples of this care to be comprehensive may be found in the chapters on Persons and Corporations Capable of being Registered; Charities; Transfer to or by a Corporation (all sorts) and Bankruptcy, Liquidation, etc. (Chaps. 10, 21, 22, 30, 31). The Registry's constant and successful efforts to ensure the smooth running of the system are also amply demonstrated. Thus the Chief Land Registrar freely exercises his power to accept amendments to the statutory forms and to approve drafts (pp. 327–330); admittedly a more rigid attitude would have prevented the problem presented by *Morelle* v. *Wakeling* [1955] 2 Q.B. 379 (see the book at p. 328) but everyone will surely agree that that risk was properly taken and should not cause modification of the general policy. The ready exercise of the power to grant absolute title has made voluntary registration an admirable cure for formal defects of title or lost documents (pp. 90–96, 129, 244, 256–257, 292–294). (In this connection the authors give at p. 240 a concise justification of compulsory registration—to enable the Registry to fix its fees on the basis of taking the smooth with the rough.) Special arrangements exist to assist in the development of building estates (pp. 61–62, 385–387) and further new procedures to this end have been introduced since the book was published (Chief Land Registrar's Report, 1959, at pp. 5, 6).

The authors write in a vigorous and lively style and do not hesitate to assert their views forcefully. As might be expected, there is not much with which to disagree, but one or two matters of general interest may be mentioned.

Although, as already remarked, the practicability of altering the statutory forms is made perfectly clear, the authors say (p. 394) that "on a sale of the whole of the vendor's land there is normally no reason for adding anything to the bare bones of the statutory form," referring to Form 19 in the Schedule to the Rules. (Similar advice is given in Ruoff's Concise Guide at p. 93). In the said Schedule Form 19 contains neither a receipt clause nor words incorporating covenants for title (see L.R.A., s. 38, and L.R.R. 76, 77), yet Form 19 as now sold by H.M. Stationery Office includes both. Neither this variation nor the receipt clause is mentioned, though the latter is surely desirable in order to obtain the benefit of sections 67–69 of the Law of Property Act, 1925. Covenants for title are, however, discussed in some detail. The general advice is that they are only relevant where the title is less than absolute or the transfer voluntary and that a purchaser suffering loss can look to the Registry for indemnity (see pp. 346–349 on Implied Covenants and pp. 397–398 on Sale, but compare the more general use contemplated at p. 350. Ruoff's Concise Guide takes the same view). In regard to rule 77 (1) —providing that transfers take effect as if expressed to be subject to matters protected on the register and overriding interests of which a purchaser has notice—the authors reject the suggestion of varying the usual covenants to include all overriding interests, concluding at p. 352 with the sentence: "It would be ludicrous for a vendor to covenant that he is able to transfer free from encumbrances subject to which he is bound to convey so far as they exist." The argument may be that rule 77 (1) prohibits such variation. Otherwise it is, with respect, difficult to follow, for the sentence quoted appears to equate—it is submitted erroneously—inability to convey free from third party rights with inability to covenant so as to be liable in damages if any such rights exist. For example, in *Eastwood* v. *Ashton* [1915] A.C. 900 and *Stoney* v. *Eastbourne R.D.C.* [1927] 1 Ch. 367 the defects in title were, respectively, occupation by an adverse possessor and a public right of way; in both cases the conveyances necessarily took effect subject to such rights

but in the former the purchaser recovered damages, and in the latter would have done so if the vendor had been responsible for the dedication. Both defects would be overriding interests (L.R.A., s. 70 (1) (*f*) and (*a*)) so no compensation would be payable by the Registry—*Re Chowood's Registered Estate* [1933] Ch. 574. Indeed the authors themselves suggest elsewhere (footnote, p. 838, discussing Indemnity) that Chowood, Ltd., might have recovered under the implied covenants.

Another query relates to the capacity of registered proprietors, especially trustees for sale. The authors assert, generally, that a registered proprietor has unlimited powers of disposition unless there is a restriction on the register (*e.g.*, pp. 323–324, 395–396, 479, 553–554). The Registrar is therefore careful to enter restrictions concerning the powers of, *e.g.*, tenants for life or statutory owners under the Settled Land Act, 1925 (pp. 422–425), corporations (Chap. 27, pp. 475–495) and charities (pp. 468, 472). However, as regards trustees for sale the only restriction advised is that prohibiting transfers unless capital money is paid to two persons, and it is stated that the powers of trustees for sale are not fettered by the Law of Property Act, 1925 (see pp. 395–396, 448, 553–554, but at pp. 187, 195 and 460 the application of the last-named Act does seem to be contemplated, and it is regarded as governing the position of infants—pp. 187–189). The question of law seems to be whether a purchaser with notice of the registered proprietors' limited capacity under the general law can ignore it, in reliance on the Land Registration Act, and be safe from rectification of the register; it is submitted, with respect, that this question is open. (Such a purchaser could, in any case transmit a clear title—*Morelle* v. *Wakeling*, *supra*.) The point of practice is whether trustees for sale should be treated differently from other proprietors of limited capacity. Trustees for sale obviously present difficulty because they may frequently be beneficially entitled and in fact thereby have unlimited powers—but might it not be held that this should be regarded as the exceptional case?

As has been indicated, the authors are enthusiastic believers in registered conveyancing, and are of course entitled to urge its cause against the unregistered system. Yet in this reviewer's respectful opinion the advocacy at times becomes exaggerated and thereby tends to defeat its purpose. Is there really anything in claims that laymen can understand the purport of the forms (p. 3), that contracts for sale may not be necessary (pp. 375–376, citing the late Sir John Stewart-Wallace) and that no provision is needed for the custody of title deeds (p. 3)? The Forms, if clearer than unregistered documents, are only so because their effect is defined in the highly technical Act and Rules; not only public encumbrances as mentioned by the authors, but overriding interests and the dangers of which entries on the register give notice make contracts necessary; while the inconvenience of losing a land or charge certificate is manifest (see, *e.g.*, pp. 37–49). Plans are said to be of "scientific accuracy" (pp. 3, 10, 54) and of "great clarity and exactitude" while plans in unregistered conveyancing are stigmatised as "vague, inaccurate and often completely meaningless" (p. 53). The scale often used of 1/1250 and the general boundaries rule are substantial qualifications. A registered title is claimed to give "complete safety and positive security against adverse claims which the system of conveyancing by deeds can never give" (p. 10) without any reference to overriding interests; at pp. 77 and 828 an absolute title is said to be "so far as humanly possible, complete and perfect" but at p. 78 acknowledged to be more freely examinable and open to upset by the courts than titles in other registered systems.

This criticism is of course a minor one; a passing irritation while reading does not detract from the very great merits of the book, which as a whole gives a fair picture. But registered conveyancing has, it is submitted, quite enough real advantages to make even muted praise sufficient. Moreover, such claims as the above are inconsistent with the otherwise perfectly valid argument that rights arising in registered conveyancing must be comparable

with those in unregistered conveyancing (see, for example, pp. 63–70 and pp. 115–117, justifying respectively general boundaries and overriding interests).

Moreover, once registration of title becomes general, this need to keep in step will disappear. It will then be time for a fundamental reappraisal of the system. Legislation almost as far-reaching as that of 1925 could be desirable. For example, we then ought to consider, *inter alia*, whether more is lost or gained by retaining as part of our law adverse possession, prescription, and implied rights created by conveyance, the effects of which cannot readily be shown on a register. The 1925 legislators produced a good system of registration of title which suits the present needs of the community (see p. 117) and works well—thanks largely to the efforts of successive Chief Land Registrars and their staffs—but which should be looked at critically with the future in mind. Here such experts as the authors can give invaluable guidance to our thinking.

Mr. Ruoff's *Concise Land Registration Practice* naturally follows the lines of its larger brother. He has himself described it as a kind of "registered conveyancing without tears" with much information set out in tabular or summary form (Preface, p. vi). It should amply fulfil this purpose, and thereby meet a general need. One feature, the reproduction of model registers and plans in Appendix A (pp. 231–239) could well find a place in the larger book, while the notes of post-1925 decisions concerning registered land (Appendix B) will aid quick reference.

One may conclude with a well-worn reviewers' cliché, which nevertheless happens to be quite true—anyone concerned with registered conveyancing should have both these books on his shelves.

F. R. Crane.

Reversionary Practice. By J. P. E. F. Peters. [London: The Solicitors' Law Stationery Society, Ltd. 1959. vii and 85 and (index) 9 pp. 27s. 6d. net.]

The sub-title is "A Guide to the Practice of Investigating Titles to Reversionary and Life Interests." The preface announces that the book is "intended as a guide and makes no attempt to be an interpretation of the law, as the late Mr. A. H. Withers dealt more than adequately with that. Thus the reader will search in vain for footnotes and almost in vain for mention of cases and statutes."

The reviewer accordingly searched and found two cases, *viz.*, *Re Earl of Chesterfield's Trusts* (1883) 24 Ch.D. 643 (p. 29) and *Re Wellsted's Will Trusts* [1949] Ch. 296 (p. 37). There are short references to some ten statutes. Even if the academic reader can bring himself to read an *opusculum* wholly without footnotes he is likely to be repelled by this book. That, of course, is merely a comment and not a criticism. The learned author is a solicitor and his book is intended to help solicitors to "grasp the rather specialised practice" and to "understand the reason for the perhaps unusual requisitions" in the reversionary market. The author has accomplished his purpose very well. He has foreseen and provided for nearly every imaginable contingency. His requisitions include those necessary to meet the possibility of community of goods where the borrower or the borrower's spouse has a foreign domicile. This is the most exotic flower in the author's collection (pp. 10, 36).

The scheme of treatment is: Introduction, Abstract of Title, Requisitions —Pedigree, Special Requisitions, Standard Requisitions, Declaration Verifying Certificates, Form of the Deed, Declaration in Support of Title, Statement of Trustees, Verification of Investments, Completion and Searches, Notices to Trustees, Distringas Orders, Further Transactions, Repayment of Charges,

Release of Powers. This makes a total of sixteen chapters in eighty-five pages! The reviewer's impression is that the book would be much better if the author would attempt "an interpretation of the law." Such a treatment is possible within the limits of a moderate expansion. *Withers*, after all, is an elaborate work.

Although the book is a guide to the practice of *investigating* titles it does not altogether disregard the subject of obtaining priority and Chapter 12 gives two pages to "Notices to Trustees" (see also pp. 26, 27 for incidental matter). Here the treatment is as bare as possible. *Dearle* v. *Hall* is not mentioned and there is no attempt at indicating the limits of the rule. There is simply a statement that "Priority in dealings with equitable interests is dependent upon the giving of notice to the trustees" followed by a brief and incomplete mention of the consequences of giving notice to some instead of to all the trustees. The rest of the chapter is concerned with forms of notice. Where treatment is so slight the reviewer hesitates to call attention to *B. S. Lyle, Ltd.* v. *Rosher* [1959] 1 W.L.R. 8; [1959] 3 All E.R. 597, for the author would almost certainly have ignored it.

F. W. Taylor.

Agricultural Holdings. By J. Muir Watt, m.a., with a Manual of Tenant Right Valuation by D. H. Chapman, a.r.i.c.s., q.a.l.a.s. 11th Edition. [London: Sweet & Maxwell, Ltd. xl and 557 pp. and index. £2 15s. net.]

Lawyers and others with any interest in the law relating to agricultural holdings have long been familiar with Jackson's *Agricultural Holdings* of which this work is nominally a new edition. However, not only has the book been completely rewritten, as Mr. Muir Watt points out in his Preface, but also the form of presentation of the subject has been very substantially changed, while nevertheless the aims of the original work have been preserved. These aims, expressed by Mr. Jackson in his Preface to the first edition (1912), were to provide an annotated text of the Agricultural Holdings Act (that of 1908 was then the relevant statute), with a manual of tenant-right valuation.

The very important changes in approach to the question of agricultural tenancies, particularly as regards the control exercisable by the Minister and the Agricultural Land Tribunal, introduced by the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, called for a change in approach by writers on the subject and the passing of the Agriculture Act, 1958, brought a new urgency to the matter.

The time was fully ripe therefore for this work, in which the author has reshaped Part I into a comprehensive statement of the law on the subject and has also provided in Part III very full notes on the text of the 1948 Act section by section, with full citation of authorities and cross-references and frequent commentary on matters of construction. Your reviewer, while sympathising with the author in his attempt to steer a middle course between bare commentary and advanced academic speculation, has felt somewhat disappointed, in his reading of the book, to find that from time to time the notes in Part III seem to have suffered from the author's desire for brevity. To take an example at random (though examples so chosen, like horses picked by the pin method, are rarely winners) the note to section 31 of the 1948 Act, when referring to the words "or other houses" in subsection (2) (*a*) refers to the ambiguity in the wording, and at least three possible interpretations. One would have liked a little more argument in support of the interpretation favoured by the author (which is, as it happens, also that favoured by your reviewer).

Part II contains Mr. Chapman's treatise on tenant-right valuation. Your

reviewer, as a mere lawyer, feels bound to limit his remarks on Part III to saying that he himself found it concise and very readable.

Parts IV and V contain respectively the text of the relevant Statutory Instruments, substantially annotated, and annotated forms and precedents. The latter cover all the forms which are likely to be required in most cases and are most carefully drawn: some of them might be described as highly ingenious.

This book, therefore, provides the practitioner with a clear and comprehensive statement of the law relating to agricultural holdings, the text of all the relevant statutory provisions, full reference to authority, invaluable guidance on the drafting of notices and other similar documents and a succinct treatise on valuation. What more could the lawyer or agricultural valuer require, so long as the matter is presented in a straightforward and lucid way, as is most certainly the case here?

S. H. Bate.

The Sanctity of Contracts in English Law. By Sir David Hughes Parry, Q.C., LL.D., Professor of English Law at the University of London. Published under the auspices of the Hamlyn Trust. [London: Stevens & Sons, Ltd. 1959. viii and 77 pp. 12s. 6d. net.]

In all legal systems the tendency is growing to permit parties to disregard a validly concluded contract on a variety of grounds, such as that a "change of circumstances that fundamentally strikes at the root of a contract" has occurred—the civilian describes this as the *clausula rebus sic stantibus*—or on the ground of supervening impossibility or frustration or because the courts are given power to grant relief to debtors in an emergency situation. The title of Sir David Hughes Parry's work might indicate that he intended to deal in some detail with this in many ways calamitous development. It would, no doubt, have been a most interesting task to investigate how much of the sanctity of contracts has remained in being in English law and in particular whether more or less of it has remained in being than in other contemporary legal systems. This, however, was—in the present reviewer's opinion, unfortunately—not his intention. His field is a far wider one: it comprises all and everything that courts and the legislature have had to say in regard to the absolute freedom of the parties to make a contract and to be bound by it. Thus we find implied terms, such as are so amply provided for in the Sale of Goods Act, the Moneylenders Acts, the Bills of Exchange Act, etc., treated on the same level with the nullity of contracts on the ground of immorality, the power of the equity courts to refuse specific performance and the development of the law relating to wagering contracts. That even this eminent author could not succeed in saying a great deal that is new or original on these numerous and partly well-covered topics within the narrow compass of this small work is hardly surprising. While his readers will, therefore, be grateful to him for a lucid exposition of a number of fundamental aspects of English law, some at least will feel that far more fish would have remained inside the net had he not cast it as wide as he has done.

E. J. Cohn.

The Dictionary of English Law. General Editor, The Late the Rt. Hon. the Earl Jowitt; Editor, Clifford Walsh, LL.M. [London: Sweet & Maxwell, Ltd. 1959. In two volumes or one (thin paper edition). £8 8s. net.]

This work has been produced by amalgamating Byrne's *Law Dictionary* with Wharton's *Law Lexicon* with additions "from many sources." The result

is a fascinating hotchpot. At least three distinct streams have been mingled. The work comprises, first, a dictionary of legal terms ancient and modern; secondly, a dictionary of words which have been judicially construed or defined by statute; and, thirdly, an index of English law. There are many excellent entries comprising in a few lines a definition and references to statute and case, with perhaps an historical note as well. There are also pure definitions, the value of which is not easy to see, such as "Damsel (Fr. *demoiselle*), a young single gentlewoman," who fortunately finds herself next to "Dan," one of "the better sort of men in this kingdom." There are miscellaneous pieces of information, *e.g.*, that: "Day Nurseries may be provided in open spaces under the London County Council (General Powers) Act, 1939, s. 71." There are short biographical notes on a few writers such as Bracton, Coke and John Perkins. There are translations of a great many Latin phrases, some with, others without, a note on their origin. And there are concise and helpful statements on the law relating to various topics such as "Advertisements," "Dangerous Driving" or "Obscenity."

It is, perhaps, open to doubt how far a useful purpose is served by combining so many functions in one work. The student of Anglo-Saxon or medieval law will find a great many of his terms defined but it is doubtful whether he will find this dictionary comprehensive enough for his purpose or whether the sources and etymology are sufficiently covered. As a dictionary of words and phrases judicially construed it is not as thorough or as well cross-referenced as other works devoted entirely to this purpose for the benefit of the practitioner. For instance, although we learn under the headings "Goldfish" and "Bicycle" that the former is not an "article" while the latter is a "carriage," the terms "article" in this sense and "carriage" are not themselves defined. "Interested witness" is discussed in relation to the Evidence Acts, 1843 and 1851, but there is no reference to "interested" persons under the Evidence Act, 1938. As "an index to the whole of English Law" (*vide* Publishers' Note), although a great deal of ground is covered, it is not sufficiently systematic and is lacking in bibliography.

There is much out-of-the-way information to be had by an Autolycus who has the leisure to browse. Here he can read the price under Anglo-Saxon laws of striking off another man's thumb. He will learn that a "Badger" bought corn for resale and that a "Bair-man" was not worth 5s. 5d. Also that "Buckwheat" is called *brank* in Essex and *crap* in Worcestershire. He can read of such rascals as the Waltham Blacks and the Owlers. He may discover the origin of the broad arrow as a symbol of government property; or of the practice of cutting off a recalcitrant child with a shilling rather than with nothing at all. Not everything is ancient. There are references to artificial insemination, horror comics and television.

If this dictionary can be called a fascinating hotchpot, so after all can English law. It is not infrequently found that much ancient lore is called in aid to solve a modern problem. Consider the case of the "*hogen hinde*" to whom the Court of Appeal referred in *Williams* v. *Linnitt* [1951] 1 K.B. 565 to decide the liability for theft of a motor-car outside a hotel; or the research into "*bestes ke gaignent sa terre*" in *Swaffer* v. *Mulcahy* [1934] 1 K.B. 608. The writer has already had occasion to refer successfully to the Dictionary in practice for a quick reference.

It is quite likely therefore that the practitioner and the scholar alike will find this reference book of help on many unexpected occasions to track down an elusive point. The writer at any rate has no wish to indulge in too many *quillets* (*q.v.*).

John Montgomerie.

INTERNATIONAL LAWYERS' CONVENTION. 1958. [Jerusalem. 360 pp.]

CANADIAN JURISPRUDENCE: THE CIVIL LAW AND COMMON LAW IN CANADA. Edited by PROFESSOR EDWARD MCWHINNEY. [London: Stevens and Sons, Ltd. 393 pp. £2 15s. net.]

THESE two books, which will be of interest to the comparative lawyer, merit a combined review because the countries concerned have legal systems which, in part, are derived from the common law and equity of England, which still play a very important role in the functioning and development of the law of the countries concerned. This curious and significant feature of both countries is the more striking in the case of Israel, which severed its political connection with this country so definitely and sharply in 1948. Yet both Israel and Canada have maintained a legal connection with England which has proved to be more fundamental, if not more lasting, than the political one.

This comes out very well in the first book to be examined, which deals with the International Lawyers' Convention that was held in Israel in August 1958. This book is the report of what must have been a strenuous, interesting and intellectually stimulating meeting. It contains essays on, and discussion of, several aspects of the law of Israel. Of particular interest are the essays, and the discussion which they stimulated, about the reception and development of common law and equity in Israel. In them Judge Baker and Mr. Shimron show how, despite some American influences, English law has been the prime source and inspiration of the law of Israel in many respects; and they both come to the conclusion that, at least for some time, English law should continue to be the most important basis of Israeli law, or at any rate of large parts of it. The remainder of the book (with the exception of two lectures by guests at the Convention, one by Professor Zelman Cowen of Melbourne on the federation of Malaya, the other by Lord Denning on Responsibility before the Law) is concerned with more specifically Israeli law, social and labour legislation, constitutional and administrative law, personal status, wills and taxation. In these parts of the book the comparative lawyer will be in his element, and will find much of interest and utility. Israel is perhaps a very apt subject for study by comparative lawyers in that the law of Israel is derived from such a multiplicity of sources, English law, as already seen, Ottoman law, and to some extent the law of the Bible. But, as the Attorney-General of Israel, Mr. Haim Cohen, shows, in his introductory lecture on the spirit of Israeli law, the law of the Bible, and the way it was interpreted by generations of scholars during the Diaspora, has not been as important as, perhaps, many Israelis would wish. On the contrary, Israeli legislation is based upon Israel's "intellectual climate . . . sociological facts . . . ethical standards . . . and political creeds and needs." And these have not always coincided with traditional Jewish law. Thus far, as is shown in the opening essays, Israel's legislators have not affected fundamental principles of English common law and equity in the field of private law, such as torts, contract and criminal law (though one interesting illustration of the way in which the legislature and courts of Israel have been more flexible in their approach is afforded by the introduction of the defence of irresistible impulse to a criminal charge: another is the way in which the absence of jury trial has affected the law on appeals and evidence). But, in the course of time, when a substantial body of judicial opinion has been built up in the decisions there will probably come a spate of legislation which will replace English law.

In Israel, therefore, the position appears to be that English law will continue to be important until such time as experience can show the way to a specifically national law for Israel. The situation in Canada, as *Canadian Jurisprudence* reveals, seems to be that while there is a body of opinion, among academic lawyers at least, in favour of growing away from English influences, the governing opinions are not so revolutionary, or evolutionary, minded.

The title of the book (which is the fourth in the University of Toronto Comparative Law Series) suggests something very nationalistic and distinct. Yet, in a sense, it is a misleading title. Despite the suggestion that Canada is legally as well as politically autonomous, and can be regarded as having a system of law which is quite apart from that of any other country, being characteristically Canadian in concepts and principles, the contrary is admitted by Professor McWhinney on the very first page of the book. There he writes that "at the present day there has not developed, as yet, anything that might be characterised as a distinctively 'Canadian' jurisprudence." In truth it would appear from this book that, apart from the Province of Quebec, where the civil law operates, the backbone of the private law of Canada is still English law. It may be that the abolition of appeals to the Privy Council, a fact which is several times stressed as an important change in the legal history of Canada, will produce something like a national law. Indeed, that seems to be the hope of some of the writers who have contributed essays to this book. For more than once the influence of English law is treated as something that should be overcome or shaken off, possibly to be replaced by reference to the law applied by courts in the United States. Hence the desire for more judge-made alterations of the law, as opposed to legislation, which is expressed by Professors McWhinney and Lederman. However, the law of the Canadian provinces, aside from criminal law, constitutional law, and the law of Quebec, is in the main English law, as understood and applied in Canadian courts.

That is the first significant feature which emerges from this book. The other is the complete separation of the law applied in the common law provinces from that applied in Quebec. The only exceptions seem to be criminal law and constitutional law. With the latter this book is not fundamentally concerned. The discussion of criminal law by Professor Mackay is the one part of the book (with the exception of Professor Cohen's study of international law—always a special case) where it appears that something like a unified system of law has been created for Canada, not without giving rise to some delicate problems in constitutional law, which Professor Mackay discusses.

The other essays bring out the sharp division between the civil law and the common law in Canada. Indeed, as Professor Dunlop points out in connection with the law of torts, the judges of the Supreme Court of Canada seem to have been at pains to maintain this separation. He writes, "True it is that the Supreme Court is made up of jurists drawn from both systems and that civilians sit on Common Law appeals. The judgments of the civil judges in such cases, however, give no evidence that they have considered any principles save those of the Common Law. . . . Most likely it reflects a reluctance of civilian judges to 'interfere' without an invitation."

These two aspects of present-day Canadian law are brought out by the method of presentation adopted by this book. It consists of essays written, for the most part, by distinguished academic lawyers (only one essay, apart from the foreword of Mr. Justice Rand of the Supreme Court, is from a practitioner), on different branches of the law of Canada, some dealing with the common law, and others, their counterparts, dealing with the civil law of Quebec's approach to the same branch of law. There is no conscious, deliberate comparison. Instead the essays present distinct treatments of, *e.g.*, contract or tort. The essays which deal with the common law are by and large accounts of the way in which the English common law has been received, interpreted and applied in Canada. That English law, and not, for example, the law applied in American courts, is the governing influence in Canada is attributed to the conservatism of the Canadian legal profession, which is sceptical of academic lawyers, who have not yet achieved much influence, but will undoubtedly be responsible for the introduction of American ideas when they do so. For in more recent years Canadian academic lawyers

have been turning more to the United States than to England for their post-graduate training; and have begun to adopt American methods and ideas in replacement of the traditional English approaches to law and legal education.

At the moment, therefore, with the possible exception of the law of real property, where English statutory changes, and especial social conditions as Professor Macdonald points out, have made the appeal of American decisions stronger, the Canadian courts look to England for the inspiration of their own decisions in the field of private law. For this reason the book contains an essay by Professor Lederman on the Common Law system in Canada, which is really a re-examination of the doctrine of precedent, or, putting it another way, of the method employed for discovering the *ratio decidendi* of a case. What Professor Lederman is discussing is the judicial process; but since he deals with English law this is tantamount to a discussion of the doctrine of *stare decisis*, its limits, rules and embellishments. The inclusion of such an essay (invaluable though it may be) in a volume on Canadian jurisprudence is questionable. On the other hand the exclusion from the book of any discussion of matrimonial or family law (of great interest in a country which has such an important and legally distinct Roman Catholic population) and of conflict of laws (perhaps the most interesting topic for a federal country) seems strange.

The essays on contract, tort and property are useful summaries of certain aspects of the Canadian approach to these matters; and (like the other book reviewed) contain much valuable material for those interested in seeing how the common law works outside England in novel surroundings. The chapters on the law of Quebec will greatly interest the comparative lawyer—as sources of information. Indeed every chapter is not without its interest for the specialist in the particular topic discussed. Yet one cannot help feeling that an opportunity has been missed for producing something better, in the sense of more enlightening, on the subject of comparative law—with which this series of publications is dealing.

G. H. L. Fridman.

Law and Opinion in England in the Twentieth Century. Edited by Morris Ginsberg. [London: Stevens and Sons, Ltd. 407 pp. 1959. £2 2s. net.]

The scheme of the seventeen lectures given at the London School of Economics during the session 1957–58, and reprinted in this book, was a continuation of Dicey's *Law and Opinion in England During the Nineteenth Century* so as "to take account of the developments since it was written" as well as "a widening of it so as to explore not only the field of legal changes, but the wider aspects of social policy." Dicey had in mind "the close dependence of legislation and even of absence of legislation in England during the nineteenth century upon the varying currents of public opinion." It was this connection which he wished to exhibit. Moreover the public opinion in which he was interested was "that kind . . . which, since it has told on the course of legislation, may with strict propriety be called law-making or legislative public opinion, and is recorded either in the statute book . . . or in volumes of the reports." Dicey's work, therefore, was designed to show the close relationship and interaction between law and opinion. It was not just the history of legal developments that he was concerned to relate, nor the history of the development of political and social theories. Legal developments and political and social manifestations and changes were only relevant to his work in so far as they could be connected together, possibly causally. Hence Dicey did not distinguish in his lectures between political and social changes on the one hand and legal changes on the other. His work was a mélange of politics and legal history. But it is

important to remember that, as Professor Griffith points out in the book under review, Dicey wrote as a lawyer.

The present book, however, is in many respects very different from that of *Dicey*. For it is not so much concerned with "law and opinion" as with "law" and "opinion." The two are not always so intimately related. To some extent this is only to be expected from the fact that instead of one author there are seventeen. More importantly, instead of the author being a lawyer, albeit with philosophical and political interest, only some of the authors of this book are lawyers, the rest being historians, sociologists, or political theorists. Hence the tripartite division of the book into Trends of Thought, Legal Developments, and Trends of Social Policy, which at once shows the extent to which the creators of the book have carried out their promise of widening the scope of Dicey's work, and the distance their book is in aims and contents from those of *Dicey*.

The first part of the book deals with political philosophy under the general rubric of Trends of Thought. Professor Ginsberg begins with a broad review of the growth of social responsibility, providing the background for what may be considered the theme of the book, namely, the way in which state action, as a result of public opinion, has increased its area of interference. In his lecture on "The Legacy of Philosophical Radicalism," Mr. Plamenatz discusses the contribution of Hume, Bentham and Mill to social and political thought in England and the English-speaking world, to the methods and assumptions used to explain society or to preserve or change it. The remaining three chapters, by Professor Burn, Mr. McCallum and Professor Cole, consider the changes, as well as the continuations of ideas and policies, that have taken place in the Conservative, Liberal and Socialist Parties respectively. The third part of the book, "Trends of Social Policy" is made up of a group of lectures concerned with various aspects of social history during the present century. Professor Titmuss discusses Health, Professor Glass, Education, Dr. Abel-Smith, Social Security, and Mr. Roberts, Industrial Relations. These lectures, naturally, contain many references to, and much discussion of, the various relevant statutes which have made so vast a difference to the general picture of social conditions in this country, in the light, of course, of the climates of opinion that produced the desire for change and the consequent legislation. But the law with which they deal is not what might be called "lawyers' law." Moreover the purpose of the lectures is not to consider changes in the *law*, so much as changes in *social conditions*; and the statute law involved is discussed for evidentiary purposes. This is pointed out not to criticise either the scope of what is discussed or the methods used in the discussion, but simply for the purpose of explaining that just as the first part of the book is philosophical in its approach, this part is sociological in its emphasis.

Thus almost half the book is not concerned with the effects of opinion on the law, in the sense in which that expression can be used to denote the framework for the relations between individuals or groups of individuals. This is reserved for the part entitled "Legal Developments." Here there are eight lectures which deal with the effect of what Dicey called "law-making or legislative public opinion" on different branches of the law. Professor Dennis Lloyd's lecture on "The Law of Associations" is very much in the tradition of *Dicey*. For it seeks to relate philosophical ideas, social change, and legal development, thereby showing not only how the law has been affected, but why it has had to develop, and, perhaps more importantly, why the courts, in seeking to relate the law to the requirements manifested by events and opinion, have not always satisfied those requirements. As he rightly points out: "much might have been done if our law had tackled these problems on the footing that the law of associations is *sui generis* and must be developed on its own lines, and not simply forced into the strait-jacket of existing legal categories." Professor Griffith's well-written, informed and informative lecture on land

law is concerned with the regulation of other people's property and the forces that have produced it. He illustrates the connection between opinion and law by town planning and land ownership, showing how first there came opinion manifested in books, writings and movements, then the creation of organisations, the promotion of reforms by political parties, the establishment of official *ad hoc* bodies and finally "out of one or other of these later stages, sometimes a piece of legislation." Professor Gower, under the heading of "Business," brings together four different but associated topics: changes in business organisation; the growth of state planning controls; the atrophy of freedom of contract; and the changing attitude of the business man towards the law. Perhaps the most significant, and as he says the most disquieting, point that emerges from his survey is the growing aloofness on the part of the business man from the law and the growing remoteness from commercial realities on the part of the lawyer. Two connected topics, "Monopolies and Restrictive Practices" and "Labour Law," are dealt with by Sir David Cairns and Professor Kahn-Freund respectively. The former traces the history and causes of the development of the modern law of monopolies and their allied evil restrictive practices. The latter, in a lecture of great scope and learning, copiously illustrated and annotated, talks about the interplay of non-intervention by the state (*Dicey's* "absence of legislation"), intervention by legislation to extend protective standards from industrial workers to new classes of workers, and individualism, the desire to uphold the principle of freedom of contract between employer and employed. The result of this, as Professor Kahn-Freund points out, is that the period under discussion was not a period of legislative inventiveness. On the contrary, custom has been of greater importance than law, a fact which illustrates the unmistakable affinity between the spirit of industrial relations and that of the English legal tradition.

Three lectures remain to be considered. Professor Robson deals with what he calls *Dicey's* weakest point "Administrative Law," a subject which more than any shows how changes in opinion, if not on the part of the public, at least on the part of the major political parties, can and have produced far-reaching alterations in the law and our legal system. Nonetheless, after a review of changes in attitudes to administrative law, its scope, nature and contents, Professor Robson can still conclude that "we still have a long way to go before we shall be able to claim that we have a system of administrative law." Dr. Mannheim in a lecture on Criminal Law and Penology deals with subjects neglected, if not completely avoided, by *Dicey* himself. Yet, of all branches of law, these are perhaps the most amenable to change, and sometimes rapid change, in the light of public expressions of opinion. Indeed the topics discussed in this lecture, homosexuality, corporal and capital punishment, and sentencing policy, have produced much public debate in the years since Dicey wrote, much of it of an influential character, though perhaps not yet influential enough. Karminski J., in a lecture on Family Law, surveys very broadly the changes that have taken place in the law of husband, wife and child during this century. Here again is a branch of law that is very readily susceptible to the fluctuations of public opinion: and Karminski J. very easily relates the legislative and judicial activity that has gone on in this part of the law to changes in social habits, and the growth of the idea that the spouses should be equal partners. But, as he rightly points out, further legislation will be difficult in view of the "real and wide divisions of public opinion on all matters affecting family life and status."

From this brief account of the contents of the book it will be seen that while there is much in it of interest to the lawyer the book is intended for a wider public. Dicey's book was a lawyer's book in the sense that it was written from a particular point of view, and in a particular style. This book cannot be described in a single word. It is an amalgam of styles and forms; some of it is factual, some discursive and nebulous, some *à propos*, and some apparently unconnected either with law or opinion or the twentieth century. On

the whole, without wishing to be partisan, it is difficult to come to any other conclusion than that the parts of the book which were the work of lawyers more closely attain to the idea (or ideal) intended by *Dicey*. That is not to say that the remainder of the book is either unnecessary or unworthy of being read. Far from it. As a survey of developments it is of great utility. But, looked at as another *Dicey* the composition of the book shows how difficult it is to continue the work of one man by a group of people who, in many ways, do not possess the same purpose, outlook and approach.

G. H. L. Fridman.

The State Legislative Institution: The Edward G. Donley Memorial Lectures, First Series. By Jefferson B. Fordham. [Philadelphia: University of Pennsylvania Press. 1959. 109 pp. $2.75.]

Freedom in a Federal World. By Everett Lee Millard. [New York: Oceana Publications, Inc. 1959. 224 pp. Cloth $3.95, paper $2.00.]

Dean Fordham's book consists of three lectures, delivered at West Virginia University in April 1957. The author rightly says that too much attention has recently been directed, largely for reasons of emotion, to "states' rights" to the exclusion of their converse, "states' responsibilities." He is concerned here solely with the latter, and the appearance of this study of the powers and duties of state legislatures in the U.S.A. is timely. Dean Fordham suggests that the question to be faced is whether the people are content to retain a state policy-making branch which has become in many ways inept and which has lost ground in popular esteem and influence, or whether the institution should be re-examined with a view to making it a powerful and effective instrument of representative government. He chooses the second alternative, and discusses the legislatures' powers, structure, organisation and procedure and then makes a number of useful suggestions for reform. For example, the author thinks the size of all these institutions should be modest, and he proposes the establishment in each state legislative body of a standing committee on sanctions and law enforcement which would be competently staffed to give thoughtful and informed attention to the problem of sanctions embodied in legislation. About one of his suggestions the reviewer is left in doubt. Dean Fordham advocates unicameral legislatures. It may be that he is right as far as American states are concerned, but his various arguments are on the whole unconvincing. To compare the unicameral legislatures in Norway, Finland, Turkey, the Swiss cantons, Queensland and the provinces of Canada, with the exception of Quebec, is reasonable, but to draw an analogy from city legislatures or councils and from business organisations seems rather far-fetched. When he considers the role of a second chamber as a "check" on the first chamber he says such a function often leads to stalemate, and he appears to prefer the possibility of unchecked legislative power vested in one political party. It is clear from his brief reference to it that he underestimates the role of the House of Lords in the United Kingdom, and some consideration of the Parliament Acts, 1911 and 1949, might have suggested a means of retaining the valuable checking power of a second chamber, while at the same time eliminating the danger of stalemate.

By way of contrast to Dean Fordham's down-to-earth ideas *Freedom in a Federal World* may cause many readers to raise their eyebrows. This is the report of a five-year study by the Conference upon Research and Education in World Government, written by Mr. Millard, the Executive Director of the Conference and editor of its discussion bulletin *One World*. The author terms inadequate the recent proposals that the U.S.A. should accept compulsory jurisdiction of the "World Court," and asserts that "world laws"

must have their source in a duly constituted "World Parliament." The Conference recommends a bicameral United Nations Assembly with chambers representing both governments and peoples of member nations, using a modified form of representation by populations. This proposed legislature would have sovereign authority over the high seas, as well as in certain trusteeship, economic, nuclear and space jurisdictions to be agreed on by the nations. There is much in these ideas, and the bona fides of the report cannot be doubted, but the trouble really lies in getting nations to agree on such far-reaching plans. Moreover the book is written so much from the American angle that it would seem to the reviewer peculiarly designed to antagonise the very people whom the Conference wishes to persuade. Again, readers genuinely attracted by the plan described in the book will find so much unnecessary padding and verbiage in the report that they are unlikely to finish the volume. The scheme has considerable merit, but it would seem unlikely ever to be realised in its present form.

D. C. M. Yardley.

Self-Defence in International Law. By D. W. Bowett. [Manchester: Manchester University Press. 1958. xv and 294 pp. 37s. 6d. net.]

The Anglo-French and Israeli operations in Egypt and the Gaza strip at the end of 1956 drew attention to the problem of the plea of self-defence as justifying a resort to force despite the general prohibitions in the Charter of the United Nations. These activities led to much loose talk about aggression, and in his *Self-Defence in International Law* Dr. Bowett emphasises how important it is not to coalesce the two concepts. In so far as aggression is concerned, he points out that the immediate problem is to bring about an end to the fighting, while with self-defence an assessment of responsibility is involved (p. 254). It is this assessment that brings in the international implications of self-defence. As was pointed out by a number of the signatories to the Kellogg Pact, each state decides for itself whether force is being used as a matter of self-defence. Dr. Bowett does not controvert this assertion. He indicates, however, that the state pleading self-defence must later face the risk of an impartial judgment that self-defence was not in fact involved (pp. 193, 262).

One of the major problems in a divided world is to determine how a state's existence is being threatened. The new refinements of "cold" war have shown that defensive measures may be necessary against hostile activities not involving the use of force. Dr. Bowett believes, for example, that the Mutual Security Act of 1951 is probably not legal within the bounds of international law other than as a reprisal (p. 47). Nevertheless, he does accept that a state would be entitled to resort to measures of anticipatory self-defence (p. 187 *et seq.*), for "the purpose of self-defence is to protect certain essential legal rights; its aim is preventive and non-retributive" (p. 20). He does not concede, however, that the Anglo-French operations were justifiable as self-defence, for, in his view, neither the United Kingdom nor France had been injured or threatened (p. 15). Since the learned author considers that the use or threat of force is now always a delict, a sanction under the Charter or a measure of self-defence (p. 155), this implies that these operations were illegal.

The problem of anticipatory self-defence is one that is likely to occur whenever a state feels itself threatened, and considers that the machinery of the United Nations is too ponderous or is subject to too many political pressures to be relied on for security. Dr. Bowett, rightly, emphasises that members retain all the general rights that pertain to sovereign states which have not been expressly limited by the Charter (p. 185), and under general

international law, which has not been abolished by the Charter, such anticipatory self-defence was perfectly legal. To hold otherwise would be to concede to non-members of the United Nations greater rights for their own defence than are granted to those states which have become members of organised international society by joining the United Nations. Furthermore, it must be remembered that the Charter only places upon the Security Council "primary responsibility" for the maintenance of peace. A lesser responsibility must be left to other organs, institutions and to individual states.

The use of the term "collective self-defence" has often been criticised. Dr. Bowett points out that when the United Nations authorises action, as in the case of the Korean operations, the states taking such action are not in fact applying measures of self-defence. Instead, they are participating in measures directed at the re-establishment of peace (p. 178), and this is likely to be usual whenever United Nations action is involved. Similarly, when treaties of a regional character refer to "collective self-defence" in accordance with article 51 of the Charter they are really invoking the right to resort to collective sanctions (p. 207), or are referring, under this rubric, to joint action by each of the participating states by reason of its individual right of self-defence (p. 216).

Dr. Bowett is clearly an admirer of the United Nations. While he recognises that general international law continues to exist side by side with the law of the Charter and that the former grants to states a wide right of self-defence which still exists under the Charter, although not so much as a "right" as a "privilege" (p. 269), he considers that the Charter has limited resort to that right, and particularly the right of a third state to come to the assistance of one purporting to be acting in self-defence: "The duty of Members is to abstain from intervention until authorised to act by a competent organ of the United Nations. To concede a general right of intervention, without the authorisation of a competent organ, would, in our view, be entirely inconsistent with the system of collective security envisaged by the Charter and, in particular, the delegation of primary responsibility for the maintenance of international peace and security by the Security Council. This limitation on the freedom of action of Members cannot be overcome by relying on an extended interpretation of the right of 'collective self-defence'" (pp. 273–274).

This view is consistent with Dr. Bowett's interpretation of the effect of the Acheson Plan and the greater emphasis that is now placed upon the role of the General Assembly. "Since the Acheson Plan it is not possible to make the assumption that there is no competent organ of the United Nations really capable of authorising collective action in the interests of international peace and security. This new development seems to take the force from the argument, of a political rather than legal character, for extending the concept of collective self-defence to cover intervention by any state to assist the victim of aggression" (p. 246). It is submitted, however, that the vast increase in membership of the United Nations, with a number of members obviously playing politics at all times, recording their votes on subjective tests coloured by their alliances and friendships, rather than on the merits of a particular situation, tends to enhance the force of the arguments rejected by Dr. Bowett in this way.

L. C. Green.

Nuclear Weapons and International Law. By Nagendra Singh. [London: Stevens & Sons, Ltd. 1959. xix and 267 pp. 35s. net.]

> "Until a more suitable code of the laws of war can be drawn up, the high contracting parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents

> remain under the protection and governance of the general principles of the law of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of public conscience."

So the Preamble to the Fourth Hague Convention of 1907 Concerning the Laws and Customs of War on Land provides for those modes of warfare not specifically governed by express rules.

International law has many unbelievers whose unbelief is strengthened (perhaps justified) by the vagueness with which some of the most vital rules of international law are formulated and the absence of an ascertainable rule in many situations.

Anyone who seeks after the rules of international law regarding the use of nuclear weapons, in the belief that those rules have a practical significance in the present uncompromising political climate, must needs have a very strong faith in the efficacy of international law. Dr. Singh's faith is such as to prompt him to ascertain the relevant rules without, fortunately, blinding him to the political realities of the moment. The result is a stimulating and thoroughly worthwhile work. The author shows a close understanding of the physical, scientific and social implications of nuclear weapons and couples this with a clear exposition of the laws of war. His conclusions are based on the application of the principles of conventional law, both general and particular, and the customary rules of warfare together with the fundamental principles of law and justice. In the main he favours the view that the use of any nuclear weapon is illegal under existing law, though a nation which is attacked with nuclear weapons may be justified in using nuclear forces by way of reprisal. But, as he points out, multifarious prohibitions are capable of further multiplication and can never present a proper solution to the problem of introducing the rule of law into the international community. "Never before has the need for installing *lex* as *rex* been greater in the international régime than today."

It is, perhaps, worth remembering that while *lex* is an unknown or vague factor it can never hope to replace *rex*. In so far as Dr. Singh's work is a contribution to our knowledge of *lex* it may one day, with other works of its type, help to infuse the rule of law into the international community.

J. A. ANDREWS.

THE TRIAL OF PETER MANUEL: THE MAN WHO TALKED TOO MUCH. By JOHN GRAY WILSON. [London: Secker & Warburg. 1959. 239 pp. 21s. net.]

IT was difficult not to feel somewhat uneasy about the case of Peter Manuel when one read the accounts of his trial in the newspapers at the time and this uneasiness is not wholly removed by the present full summary of the sixteen days of the hearing at Glasgow in May 1958, which led to the conviction of the young Scot for capital murder.

The reason for this is not any very serious doubt that the accused did commit most or all the grave crimes with which he was charged and of which he was convicted. What emerges here—and it is obviously by no means all that was known to the police about his nefarious activities in the neighbourhood—is enough to demonstrate powerfully that this 31-year-old criminal was a real menace to society and that it was high time to bring him to book. If the death sentence can ever be justifiable and deserved, the facts revealed in this indictment seemed to call for it; what may trouble lawyers is the evidence, or rather the lack of it, on which it was based.

Mr. John Gray Wilson, who has done an excellent job in reducing the vast bulk of the testimony and speeches to manageable proportions for this volume, has come to the conclusion that Manuel owed his conviction to the statements he himself made to the police just before and after arrest, and this is what has induced him to give his book the somewhat hackneyed sub-title *The Man who*

Talked too much. Actually, these statements (which Manuel afterwards claimed had been obtained by improper means) were almost the only substantial evidence pointing definitely to Manuel as the perpetrator of most of the eight different crimes committed over a period of two years which were joined in one indictment against him; generally speaking, such outside corroboration as was put forward by the prosecution came not only from questionable witnesses but was pretty negligible in itself. One looks in vain for evidence of certain fairly obvious scientific investigations which might have thrown decisive light on the issues and in the circumstances one cannot help feeling that several of the charges on which Manuel was actually convicted were never properly brought home to him. Matters are not eased by the fact that he insisted on dismissing his counsel and conducting his defence himself.

The editor writes that the full story of these crimes "will not be written for many years, if indeed it is ever possible to find out anything like the whole truth." Certainly, the prosecution never was able to put forward a completely coherent account of what happened; what is more, the special defence of impeachment available in Scotland, of which Manuel availed himself on the two main charges, sometimes tends to create the misleading impression that it was considered incumbent upon the accused, if he was to extricate himself from statements which he had withdrawn, to demonstrate the guilt of other named persons.

Mr. Wilson, in his editorial capacity, is evidently not free from misgivings himself. In the last chapter entitled "Some Problems" he examines a number of criticisms that might be made of the conduct of investigations, of the law and of our approach to the aggressive pyschopath of which Manuel was undoubtedly, as he says, a "typical" (if particularly grave) example. The chapter deserves reading.

H. A. Hammelmann.

Tax Avoidance and Tax Reduction. By A. S. Silke. [South Africa: Juta & Co., Ltd. U.K. Agents: Sweet & Maxwell, Ltd. 592 pp. U.K. price £7 1s. net.]

This is a detailed account of the different methods of tax avoidance in South Africa. Anti-avoidance legislation in South Africa has not reached anything like the same degree of complexity that it has in Great Britain, and the provision in general terms against tax avoidance schemes which is contained in section 90 (1) (*a*) of the Income Tax Act, 1941, which resembles in some degree the general provision against avoidance of profits tax in section 32 of the Finance Act, 1951, of the United Kingdom, has been very narrowly interpreted in *C.I.R.* v. *King*, 1947 (2) S.A. 196 (A.D.); 14 S.A.T.C. 184, with the result that there is still great scope for the accountant or lawyer to effect considerable reductions in liability by the skilful organisation of the client's affairs. Mr. Silke clearly has a massive knowledge of South African tax law, and his book is far more detailed and comprehensive than anything available in regard to United Kingdom tax avoidance. He nevertheless writes in a clear and interesting manner.

It is to be noticed that the author seems to admire the anti-avoidance legislation of the United Kingdom, since it achieves its objects with a fair degree of efficiency, and does so by specific legislation directed against particular avoidance devices instead of employing general provisions. He advocates similar legislation for South Africa. The reader can scarcely forbear, however, to hope that whatever legislation is passed in South Africa is better drafted than the tortuous enactments which have in recent years found their way to the United Kingdom Statute Book.

D. C. Potter.

Annual Survey of South African Law, 1958. By The Faculty of Law, University of the Witwatersrand, Johannesburg. [South Africa: Cape Town and Johannesburg: Juta & Co., Ltd. London Agents: Sweet & Maxwell, Ltd. 1959. xxx and 266 and (index) 27 pp. 48s. net.]

The present volume maintains the high standard of previous years. The detailed index is a particularly valuable feature. Points in the present volume which may interest English lawyers include an account by Mr. C. C. Turpin of recent cases concerned with estoppel and mistake in the formation of contracts; a lucid account by Professor Ellison Kahn of the recent treatment by the courts of discretionary powers in administrative law; and Mr. Pollak's note on the recognition of polygamous marriages. There is, of course, much else of interest to the Roman-Dutch lawyer and, in particular, Professor Scholtens' unique combination of historical erudition and deft analysis of modern case law shows to advantage in the section on Property.

A. M. Honoré

The Administration of Insolvent Estates in South Africa. By David Shrand, m.com., a.s.a.a., c.a.(s.a.). Second edition. [South Africa: Cape Town and Johannesburg: Juta & Co., Ltd. London Agents: Sweet & Maxwell, Ltd. 1959. xxii and 464 and (index) 35 pp. £5 5s. net.]

Since the appearance of the first edition of this work there has been a spate of case law and, to a lesser degree, statutory amendments as well as departmental rulings dealing with various aspects of insolvency. The text has been revised in the light of these innovations. The work is outstanding as providing both theoretical and practical information. With this handbook to guide him no trustee of an insolvent estate should be at a loss as to what is to be done and in what order the various steps are to be taken.

A. M. Honoré

Books and Publications Received

Verrykkingsaanspreeklikheid in die Suid-Afrikaanse Reg. By Wouter De Vos. [Juta & Co., Ltd. 1958. xiii and 233 pp. 57s. 6d.]

Legal Sources and Bibliography of Czechoslovakia. By Alois Bohmer, Jaroslav Jira, Stefan Kocvara, and Jindrich Nosek. Vladimir Gsovski, General Editor. [Published for Free Europe Committee, Inc., by Frederick A. Praeger, New York. Distributed by Stevens & Sons, Ltd. 1959. 180 pp. 42s.]

The Lawyer's Companion and Diary 1960. Editors: W. H. Redman, m.b.e., and Leslie C. E. Turner. [London: Stevens & Sons, Ltd. 2155 pp. 30s. (Day to a Page); 25s. (Week at an Opening).]

The Taproom Lawyer. By Michael Thomas. Illustrated by Diana John. [London: Chatto and Windus. 1959. 131 pp.]